Supreme Court, U.S.
FILED

(1) 81556 MAR 8 - 1999

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1998

MICHAEL L. PIASKOWSKI,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Wisconsin

PETITION FOR WRIT OF CERTIORARI

T. Christopher Kelly
Counsel of record

Thomas, Kelly, Habermehl & Mays, S.C.
145 W. Wilson Street
Madison, Wisconsin 53703
Tel. (608) 255-9491

4688

QUESTIONS PRESENTED

1. Is a defendant's right to due process violated when an appellate court sustains a conviction on the basis of evidence that the trial judge considered to be too incredible to support the conviction?

2. Is the constitutional right to confront witnesses violated when the unreliable hearsay statement of a co-defendant is admitted against a defendant on the theory that the statement was against the declarant's social interest, and if so, is the error cured if the declarant takes the stand on his own behalf after the prosecution rests?

3. Is the right to due process violated when the court refuses to grant a new trial on the basis of a recantation by the only witness who linked the defendant to the crime?

4. Did the denial of a severance violate the petitioner's right to due process?

5. Was the petitioner's right to confront witnesses violated when he was precluded from cross-examining a prosecution witness to elicit the witness' attempt to negotiate with the district attorney's office for favorable treatment?

6. Did the State violate the petitioner's right to obtain exculpatory evidence when it failed to disclose that a key witness told the prosecution prior to trial that he did not believe his statement to the police was truthful?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS 2
Fifth Amendment 2
Sixth Amendment 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 5
CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES CITED:

California v. Green, 399 U.S. 149 (1970) 11
Chambers v. Mississippi, 410 U.S. 284 (1973) .. 10
Idaho v. Wright, 497 U.S. 805 (1990) 11
Jackson v. Virginia, 443 U.S. 307 (1979) 5,6
Kentucky v. Stincer, 482 U.S. 730 (1987) 10
Lee v. Illinois, 476 U.S. 530 (1986) 11
Ohio v. Roberts, 488 U.S. 56 (1980) 11
State v. Pepin, 110 Wis.2d 431, 328 N.W.2d 898 (Ct. App. 1982) 11
State v. Stevens, 171 Wis.2d 106, 490 N.W.2d 753 (1992) 12
Stewart v. State, 83 Wis.2d 185, 265 N.W.2d 489 (1978) 8
White v. Illinois, 502 U.S. 346 (1992) 12
Williamson v. United States, 512 U.S. 594 (1994) 11

No. _____

In the
Supreme Court of the United States
October Term, 1998

MICHAEL L. PIASKOWSKI,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael L. Piaskowski respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Wisconsin entered in this proceeding on September 22, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin has not been published. It is reproduced in the attached appendix. The Supreme Court of Wisconsin entered an unpublished order denying the petitioner's petition for review.

JURISDICTION

The judgment of Court of Appeals of Wisconsin was entered on September 22, 1998. The Supreme Court of Wisconsin entered an order on December 8, 1998 denying the petitioner's petition to accept review of the decision of the court of appeals. This Court's jurisdiction to consider this petition from the final judgment by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

(a) Fifth Amendment, United States Constitution:

> No person ... shall be ... deprived of life, liberty, or property, without due process of law ....

(b) Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

STATEMENT OF THE CASE

The Green Bay Police Department received an anonymous telephone call on November 10, 1992 reporting an employee theft that was expected to occur at the James River paper mill. The caller said that Keith Kutska would be

taking a piece of extension cord from the plant. The caller asked the police to inform plant security.

The police relayed the caller's tip to James River plant security. James River security guards tried to stop Kutska as he left the plant on November 10, 1992. The guards asked Kutska to open the bag he was carrying. Kutska said there was nothing in the bag but laundry and left the plant.

Kutska later learned that the security guards had tried to stop him because of the anonymous call to the police. He obtained a copy of the taped call from the police department on November 20, 1992. Kutska listened to the tape and recognized Thomas Monfils' voice.

Kutska contacted Marlyn Charles, the union president. Kutska wanted to file "union charges" against Monfils. Charles said charges couldn't be filed against Monfils because Monfils didn't leave his name on the tape. Kutska suggested that Monfils might admit that he made the call. Charles told him that the admission would need to be witnessed by two people before charges could be filed.

Kutska played the tape for Michael Piaskowski and Randy LePak. They both recognized Monfils' voice. Kutska asked them to act as witnesses because he knew they would be working on the following day, Saturday.

On Saturday, November 21, 1992, prior to 7:00 a.m., Kutska played the tape for a large number of people at James River. Marlyn Charles made a copy of the tape in coop[1] 8 prior to 6:30 a.m. A number of people who worked in the area of coops 5 and 8 listened to the tape at that time.

At some point, LePak went to the coop 9 to meet Kutska. Other employees were also there. While LePak was in coop 9, Dale Basten and Mike Johnson arrived to repair a problem with the number 9 paper machine. Kutska played the tape for the occupants of the coop.

---

[1] Control rooms for paper machines are commonly referred to as "coops."

Donald Boulanger signaled that Monfils and Piaskowski had entered coop 7, where they were working. LePak and Kutska entered coop 7. Kutska played the tape for Monfils and asked him to admit that his voice was on the tape. Monfils eventually admitted that the voice was his. Kutska asked him why he did it. Monfils said he had acted as a concerned employee. Kutska told Monfils that his actions had been malicious. Kutska then left. Piaskowski told Monfils that he couldn't believe Monfils had done that. Piaskowski then left the coop. LePak told Monfils that he had jeopardized Kutska's job, and that it was a chicken shit thing to do. LePak then left the coop.

Kutska returned to coop 9, where he continued to play the tape for people who entered the coop. Piaskowski eventually entered coop 9 and heard Kutska playing the tape for various occupants of the coop. At that time, Piaskowski heard Kutska tell Moore to go "give Monfils some shit."

Brian Kellner testified that Kutska told him about a confrontation between Monfils and the six defendants that took place near a bubbler. Kellner's testimony about that confrontation is discussed below.

Soon after the alleged confrontation by the bubbler, Piaskowski asked Pete Delvoe if he had seen Monfils. Piaskowski called a supervisor to report Monfils missing because he wanted to get Monfils in trouble.

After drinking at a wedding reception about six months after Monfils' murder, David Wiener suddenly remembered that he had seen defendants Basten and Johnson apparently carrying something through the plant. The State argued that they were carrying Monfils. The State's handwriting expert testified that Wiener wrote a suicide note that purported to have been written by Monfils. However, Wiener was not charged with Monfils' murder.

Monfils' body was eventually found in a pulp vat. A weight had been tied around the neck. Medical testimony established that Monfils died from asphyxiation by inhaling

the pulp that was in the vat and/or by strangulation from the rope around his neck. He had been beaten before he died.

Six defendants, including Piaskowski, were jointly tried for murder as a result of Monfils' death. All six were convicted. Piaskowski appealed to the Court of Appeals of Wisconsin. The court of appeals affirmed his conviction. Piaskowski filed a petition for review with the Supreme Court of Wisconsin, seeking discretionary review of the Court of Appeals' decision. The Supreme Court did not grant review.

The federal questions presented on appeal were raised in the court of appeals by the petitioner's initial brief. The sufficiency of evidence question (issue I below) was raised in the trial court by a post-conviction motion seeking a judgment of acquittal. The confrontation question (issue II below) was raised in the trial court prior to trial by pretrial motion and after trial by a post-conviction motion. Both issues are addressed by the trial court's order denying post-conviction motions.

REASONS FOR GRANTING THE WRIT

I. A DEFENDANT'S RIGHT TO DUE PROCESS IS VIOLATED WHEN AN APPELLATE COURT SUSTAINS A CONVICTION ON THE BASIS OF EVIDENCE THAT THE TRIAL JUDGE CONSIDERED TO BE TOO INCREDIBLE TO SUPPORT THE CONVICTION

Criminal defendants have a constitutional right to reversal of convictions that are not supported by proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). That constitutional standard is diminished,

if not lost, when an appellate court disregards a trial judge's conclusion that the only evidence against the defendant was so incredible that it could not support a guilty verdict. The Wisconsin court of appeals held that it lacked the power to overturn a conviction even if it believed that the trier of fact should not have found guilt based on the evidence before it. *State v. Piaskowski,* No. 97-2104-CR, slip op. at 3 (Wis. Ct. App. Sept. 22, 1998) In the ordinary case, that standard of review provides a dubious safeguard of the right to be free from conviction when the evidence fails to establish guilt beyond a reasonable doubt. This, however, is not an ordinary case. The trial judge concluded that the only evidence offered against Piaskowski was so lacking in probative value that it would not support a conviction. The court of appeals nonetheless relied on that very evidence in affirming Piaskowski's conviction. The standard of review adopted by the court of appeals — a standard that affirms convictions on the basis of evidence that the trial judge found to be patently incredible — is inconsistent with the constitutional standard of appellate review required by *Jackson*.

The court of appeals found the evidence sufficient to establish that Piaskowski conspired with his five co-defendants to do away with Monfils. The State didn't argue to the jury that Piaskowski engaged in a conspiracy. Rather, the State argued that Piaskowski aided and abetted the murder. Because there wasn't a shred of evidence to support that theory, the State abandoned the "aid-and-abet" theory on appeal. The court of appeals adopted the conspiracy theory, citing a 1934 case for the proposition that a murder conspiracy continues during the time that the conspirators take action to prevent the discovery of the crime to conceal the identities of the perpetrators. (Slip op. at 6) The court of appeals cited no evidence, however, that Piaskowski agreed to take any action whatsoever to hide the crime. In fact, as the court of appeals noted, Piaskowski called attention to the fact that Monfils was missing.

To conclude that the evidence supported Piaskowski's participation in a conspiracy to murder Monfils, the court of appeals relied on the following evidence.

> Although there is no evidence that Piaskowski directly killed Monfils by throwing him into the vat, the jury could reasonably infer that Piaskowski was part of the conspiracy to beat Monfils and cover up his death. The evidence establishes that Piaskowski was present at the confrontation and told the foreman that Monfils was missing and that "some heavy shit" was "coming down." There was also evidence that Piaskowski and the other defendants kicked and beat Monfils. From this evidence, it was reasonable for the jury to infer that Piaskowski played a larger role than that of mere observer, that he took overt action to beat Monfils and cover up the murder when he reported Monfils as missing. The jury could reasonably infer that Piaskowski knew that Monfils was missing because he knew Monfils had been dumped into a vat.

Piaskowski, slip op. at 6. No witness ever claimed to have seen Piaskowski kick or beat Monfils. One inmate witness testified that one of Piaskowski's co-defendants told him that some individuals were striking Monfils, but that witness didn't identify Piaskowski as a person who did so. That witness, in fact, didn't identify Piaskowski as a person who was present during the beating. Thus, the only evidence upon which the court of appeals could have relied in the brief analysis cited above was the testimony of Brian Kellner, who claimed that Keith Kutska (one of the co-defendants) told him during a drunken discourse in a bar that a confrontation with Monfils had taken place and that Piaskowski had been present at the confrontation. Kellner did *not* testify, however,

that Kutska identified Piaskowski as someone who either struck Monfils or encouraged anyone else to do so. In fact, Kutska supposedly told Kellner that he left the scene before the confrontation with Monfils escalated into violence.

The court of appeals apparently bootstrapped the hearsay testimony of the inmate who claimed to have heard that some participants in a confrontation beat Monfils (but didn't identify Piaskowski as being present) to the hearsay testimony of Kellner, who said Kutska told him that Piaskowski was present at a confrontation with Monfils. The court of appeals' implicit conclusion that the two pieces of hearsay added up to proof beyond a reasonable doubt overlooked the trial court's assessment of Brian Kellner. The trial court expressly ruled that Kellner's testimony (which Kellner later recanted), recounting Kutska's drunken ramblings, was not credible.[2] The trial court ruled that defense counsel correctly argued that a conviction could not be based on Kellner's evidence, and opined that if Kellner's testimony were the only evidence in the case, "the Court would never have allowed this case to go to the jury." The trial court mistakenly upheld Piaskowski's conviction on the theory that the jury may not have believed Piaskowski's exculpatory testimony and that it was allowed to infer from its disbelief of Piaskowski's testimony that he committed the crime — a theory that everyone concedes is contrary to Wisconsin law, *see Stewart v. State,* 83 Wis.2d 185, 193, 265 N.W.2d 489 (1978) — and that the court of appeals did not rely upon in sustaining the conviction.

The court of appeals thus upheld Piaskowski's conviction on the basis of testimony that the trial judge viewed as too incredible to support a conviction. The court

---

[2] The trial judge described Kellner's testimony in these terms: "He recounted an instance which occurred after an all-day drinking bout. Mr. Kutska was intoxicated when the events occurred. Mr. Kellner was close behind him in his level of intoxication."

of appeals did so because it felt bound to accept any evidence of guilt upon which the jury might have relied — even evidence that the trial judge ruled out as a possible basis for conviction. Had the trial judge not been mistaken about his alternate theory for sustaining the conviction, he would have thrown out the conviction as unsupported by proof beyond a reasonable doubt. When a trial judge views the only evidence of guilt as insufficient to support a conviction, sustaining a conviction on the basis of that evidence frustrates *Jackson* and deprives a defendant of his right to have his conviction reversed if the evidence against him does not prove guilt beyond a reasonable doubt.

The Supreme Court should grant review to decide whether the rule announced in *Jackson* is violated by a state appellate court that rejects a trial judge's decision that evidence in support of guilt is too incredible to justify a conviction. Wisconsin's deviation from the constitutional standard threatens the integrity of convictions statewide, and — if the Supreme Court does not decide the issue — is likely to result in appellate courts in Wisconsin and elsewhere sustaining convictions despite the trial judge's belief that the evidence supporting a conviction did not prove guilt beyond a reasonable doubt. The unique issue presented by this case — whether an appellate court reviewing a sufficiency of evidence claim is free to disregard the trial judge's conclusion that the evidence relied upon by the appellate court was too incredible to prove guilt beyond a reasonable doubt — is an important issue of constitutional law. Appellate courts in Wisconsin and elsewhere need guidance in shaping standards of review that are mindful of the "beyond a reasonable doubt" standard.

II. THE CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES IS VIOLATED WHEN THE UNRELIABLE HEARSAY STATEMENT OF A CO-DEFENDANT IS ADMITTED AGAINST A DEFENDANT, AND IS NOT CURED WHEN THE CO-DEFENDANT LATER TESTIFIES ON HIS OWN BEHALF

The case against Piaskowski was built around the hearsay testimony of Brian Kellner, who claimed that Keith Kutska, a co-defendant, told him that he and the other co-defendants confronted Monfils to let him know they were displeased that Monfils had reported Kutska's apparent theft of a cord to the police. According to Kellner, Kutska said that the co-defendants hollered at Monfils, one of them (not identified by Kutska) slapped the back of Monfils' head, and another (not Piaskowski) shoved Monfils' in the chest. Kutska asked "what if" Monfils had been hit with a wrench or a board, but didn't say that actually happened. Kutska told Kellner that he left at that point, and didn't see what happened after he left.

Over objection, Kellner's hearsay statement was admitted against the other co-defendants. The trial court concluded, and the court of appeals agreed, that the statement was admissible as a statement against Kellner's penal and social interest. The court concluded that the admission didn't violate the confrontation clause because these were firmly rooted hearsay exceptions, and because Kellner later testified in his defense.

Kellner's testimony violated the confrontation clause. The Sixth Amendment guarantees the right to confront witnesses. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). The right to confront includes the right to cross-examine. *Kentucky v. Stincer,* 482 U.S. 730, 737 (1987). Confrontation permits the jury to assess the credibility of the person making the statement and forces the witness to submit

to cross-examination, "the greatest legal engine ever invented for the discovery of the truth." *California v. Green,* 399 U.S. 149, 158 (1970).

The confrontation clause restricts the admissibility of hearsay. Generally, the prosecution must prove that the declarant is unavailable to testify at trial. The prosecution must next demonstrate that the hearsay is so reliable that confronting the witness would essentially be a fruitless endeavor. *Idaho v. Wright,* 497 U.S. 805, 822-23 (1990); *Ohio v. Roberts,* 488 U.S. 56, 65 (1980).

Kellner's statement wasn't reliable. As the trial judge noted, Kellner recounted a statement related to him during the course of an all-day drinking bout. Kutska didn't say anything against his own interest when he claimed that Piaskowski was present during a confrontation with Monfils. Rather, Kutska's statement was exculpatory — he claimed to have left when pushing started. He denied striking Monfils himself and denied being present during any act of serious violence against Monfils.

It is a "time-honored reaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." *Lee v. Illinois,* 476 U.S. 530, 546 (1986). Kutska's statement that Piaskowski was present during the confrontation with Monfils inculpated Piaskowski (at least in the view of the prosecution, which argued that Piaskowski was part of the crowd and thus must have had something to do with Monfils' death). That statement was not remotely against Kutska's interest, and thus was not reliable.

Wisconsin and federal law both stand for the proposition that the portion of a co-defendant's statement that inculpates another co-defendant is not an admission against interest. *Williamson v. United States,* 512 U.S. 594, 599-600 (1994); *State v. Pepin,* 110 Wis.2d 431, 438, 328 N.W.2d 898 (Ct. App. 1982). Certainly, Kutska said nothing against

his own interest when he said that Piaskowski was present at a confrontation with Monfils, and that Kutska left Piaskowski (and the other co-defendants) there before anything happened to Monfils. Kutska's admission that he was present at the confrontation might have been against his interest, but not his contention that Piaskowski was also present.

In a cursory analysis, the court of appeals concluded that "Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation," but that his admission was nonetheless against his interest because a reasonable person would not "assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later." *Piaskowski,* slip op. at 18. That analysis begs the question; whether or not Kutska inculpated himself, his claim that Piaskowski was present was not a statement against his own interest, and thus did not provide an exception to the confrontation requirement. Moreover, if Kutska "subjectively believed he was exculpating himself," his statement cannot be viewed as so reliable that it provides a basis for convicting Piaskowski of murder.

The court of appeals also viewed the statement as admissible because it was against Kutska's societal interest. Yet only "firmly rooted" exceptions to the hearsay rule will overcome the constitutional right to confront a witness. *White v. Illinois,* 502 U.S. 346, 356 (1992). The "against societal interest" exception is far from "firmly rooted." Only ten states have adopted the exception. *State v. Stevens,* 171 Wis.2d 106, 112, 490 N.W.2d 753 (1992). The Federal Rules of Evidence does not incorporate the "social interest" exception. *Id.* at 112-13. In fact, Congress specifically rejected the exception. The House Report noted that the social interest exception lacked sufficient guarantees of reliability. *See* Report at 16-17, *quoted in* 2 Moore's Federal Rules Pamphlet ¶ 804.12[2] at 432 (1998). A hearsay exception that exists in only ten states, that didn't exist at

common law, and that has been rejected by Congress can hardly be said to be "firmly rooted." Since some states are adopting the exception, however, the time is ripe for the Supreme Court to decide whether evidence admitted pursuant to that exception justifies dispensing with the right of confrontation.

The final question is whether Piaskowski's confrontation rights were restored when Kutska took the stand in his own defense, affording Piaskowski a chance to cross-examine him. If Kutska's statement had been barred by the confrontation clause during the State's case-in-chief, as it should have been, a directed verdict for Piaskowski would have been entered after the State rested, because there was no other evidence linking Piaskowski to the crime. Thus, the fact that Kutska was forced by the admission of his statement into evidence to take the stand and refute the statement cannot render the error harmless.

The Supreme Court has never decided whether a denial of the right to confront a witness is rendered harmless if the witness testifies after the State rests. Given the circumstances of this case — in which the evidence that should never have been admitted formed the only basis for Piaskowski's conviction — finding the error harmless would destroy the prophylactic value of the confrontation clause. The Supreme Court should grant *certiorari* to clarify how states are to apply the confrontation clause in situations where a witness will not take the stand during the State's case-in-chief but may testify later.

III. DUE PROCESS IS VIOLATED WHEN THE COURT REFUSES TO GRANT A NEW TRIAL ON THE BASIS OF A RECANTATION BY THE ONLY WITNESS WHO LINKED THE DEFENDANT TO THE CRIME

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

IV. THE DENIAL OF A SEVERANCE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

V. THE PETITIONER'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN HE WAS PRECLUDED FROM CROSS-EXAMINING A STATE'S WITNESS TO ELICIT THE WITNESS' ATTEMPT TO NEGOTIATE WITH THE DISTRICT ATTORNEY'S OFFICE FOR FAVORABLE TREATMENT

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

VI. THE STATE VIOLATED THE PETITIONER'S RIGHT TO OBTAIN EXCULPATORY EVIDENCE WHEN IT FAILED TO DISCLOSE THAT A KEY WITNESS TOLD THE PROSECUTION PRIOR TO TRIAL THAT HE DID NOT BELIEVE A STATEMENT HE MADE TO THE POLICE WAS TRUTHFUL

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

CONCLUSION

For all the reasons stated, petitioner, Michael L. Piaskowski, requests that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals of Wisconsin.

Respectfully submitted,

THOMAS, KELLY,
HABERMEHL & MAYS, S.C.
Attorneys for petitioner

T. Christopher Kelly
State Bar No. 1012740

[Filed September 22, 1998]

IN COURT OF APPEALS
FOR STATE OF WISCONSIN
DISTRICT III

Case No. 97-2104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. PIASKOWSKI,

Defendant-Appellant.

DECISION

[1] APPEAL from a judgment and order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Michael L. Piaskowski appeals the judgment of conviction and postconviction order as a result of the November 1992 murder of Thomas Monfils. Following a joint trial, a jury convicted Piaskowski and five [2] other defendants[1] of first-degree intentional homicide,

---

[1] Defendants Dale Basten, Michael Johnson, and Reynold Moore's appeals were consolidated and affirmed in February 1998. ***State v. Basten***, Nos. 97-0918-CR, 97-0919-CR 97-1193-CR, unpublished slip op. (Wis. Ct. App. Feb. 17, 1998). We affirmed Michael Hirn's

party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. On appeal, Piaskowski argues that: (1) insufficiency of the evidence entitles him to a new trial; (2) newly discovered evidence entitles him to a new trial; (3) the trial court erred by admitting a codefendant's hearsay statement; (4) denial of his severance motion violated his right to a fair trial; (5) denial of cross-examination of a State witness violated his confrontation rights; and (6) the State failed to disclose exculpatory evidence. We reject these arguments. In addition, Piaskowski requests that we review a State investigator's sealed personnel records to determine whether they impeach the investigator's credibility. We have reviewed the personnel records and agree with the trial court that they contain no relevant evidence. Accordingly, we affirm the judgment and postconviction order.

1. Sufficiency of the Evidence

Piaskowski argues that he is entitled to a new trial because the evidence is insufficient to support his conviction. To support this argument, Piaskowski cites ***Frankovis v. State***, 94 Wis.2d 141, 148, 287 N.W.2d 791, 794 (1980), for the proposition that the test of sufficiency is whether the evidence is "strong enough to exclude to a moral certainty every reasonable hypothesis of innocence." Piaskowski predicates his entire argument on this standard. In ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990), however, [3] our supreme court rejected the ***Frankovis*** standard.[2] Contrary to Piaskowski's assertion,

---

conviction in June 1998. ***State v. Hirn***, No. 97-3518-CR, unpublished slip op. (Wis. Ct. App. June 30, 1998).

[2] ***Poellinger*** provides that "[t]o the extent that prior decisions of this court have suggested that these hypothesis of innocence rule is in any way applicable in reviewing the sufficiency of the evidence to support a conviction, we disapprove of those decisions and take the opportunity presented in this case to clearly state that it is not." ***State v. Poellinger***,

Poellinger governs our review, which is the same whether the evidence is direct or circumstantial. ***Id.***

We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt." ***Id.*** at 507, 451 N.W.2d at 757-58. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, [we] may not overturn a verdict even if [we] believe that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507, 451 N.W.2d at 757. We need only decide if the "theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Id.*** at 508, 451 N.W.2d at 758.

The State presented evidence that on November 10, 1992, the police received an anonymous call reporting that Keith Kutska, an employee of the James River Corporation, intended to steal an expensive electrical cord from his employer. After Kutska finished his shift, he tried to leave the premises, but a security guard asked to inspect his bag. Because Kutska refused to open the bag, [4] he received a five-day unpaid suspension. Kutska later obtained a tape of the call from police. On November 20, Kutska approached Piaskowski near the No. 7 coop[3] and told him about his suspension and tape of the telephone call. About 5:30 p.m., after Kutska's shift was over, he called Piaskowski at work

---

153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990) (footnote omitted). In short, the supreme court specifically disapproved of ***Frankovis v. State***, 94 Wis.2d 141, 287 N.W.2d 791 (1980). ***Poellinger***, 153 Wis.2d at 506 & n.6, 451 N.W.2d at 757, & n.6.

[3] Located across from each paper machine is a control room or "coop."

and played the entire tape for him, and Piaskowski recognized the voice as Monfils'. Kutska implied that he had talked to the union and explained to Piaskowski that because Monfils did not identify himself on the tape, he needed two or three witnesses to identify Monfils before he could file union charges against him. Piaskowski was scheduled to work the next day, and he agreed to be a witness for Kutska when he played the tape for Monfils.

On November 21 at approximately 7 a.m., Kutska and Randy LePak entered the No. 7 coop; Piaskowski and Monfils were already in the coop. Kutska turned on a tape recorder, played the tape, and asked Piaskowski to "{name this tune." Monfils admitted he had indeed made the call. Kutska left the coop, and Piaskowski and LePak remained. On his way out of the coop, Piaskowski said, "Geez, Tom, I just fuckin' don't believe you'd do that." Piaskowski admitted that he was upset and disgusted that Monfils had made the call to police. Kutska then went to the No. 9 coop and played the tape again for those who entered the coop. Later, at approximately 7:30 a.m., Monfils performed a turnover (a change in the paper roll) on his paper machine. At approximately 8 a.m., Monfils was reported missing. The State presented evidence that between 7:30 and 8 a.m., a group of employees, including Piaskowski and the five other defendants, confronted Monfils. A verbal confrontation became physical, and Monfils was beaten. A blow to the back of the head rendered Monfils unconscious. The following day, [5] Monfils' partially decomposed body was found in a pulp vat. A heavy weight was found tied around Monfils' neck.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den Bar, Kutska described the November 21 confrontation with Monfils, himself, Basten, Moore, Johnson, Piaskowski and Hirn. Kutska told Kellner

that he stood back and watched as the others shouted at Monfils and shook the tape in his face. Kutska described the events in terms of "what if" somebody had hit Monfils in the head with a wrench or a board.

James River employee David Wiener testified that on November 21 at approximately 7:40 a.m., he saw codefendant Dale Basten and Michael Johnson walking toward a vat connecting the No. 7 and No. 9 paper machines. They were walking hunched over, approximately six feet apart, and appeared to be carrying something. At approximately 7:45 a.m., Moore and Kutska entered the No. 7 coop. Shortly thereafter, Piaskowski entered the coop, and Kutska told Piaskowski to notify the foreman that Monfils was missing. According to Piaskowski, he informed the foreman that "some heavy shit" was "coming down" and recommended that the foreman "talk to Keith [Kutska] to find out what happened." Piaskowski testified that he called the foreman to "get Tom in trouble with the company."

A conspiracy requires a meeting of minds to accomplish a common purpose. ***O'Neil v. State***, 237 Wis. 391, 404-05, 296 N.W. 96 (1941). The two elements of a conspiracy are an agreement among two or more persons to accomplish a criminal objective and individual intent to accomplish that objective. ***State v. Hecht***, 116 Wis.2d 605, 625, 342 N.W.2d 721, 732 (1984). Circumstantial evidence is sufficient to establish that an agreement exists. ***Id.*** No [6] express agreement is required; rather, a "mere tacit understanding of a shared goal is sufficient." ***Id.*** Further, while intent may be inferred from conduct, mere presence and ambivalent conduct at a crime scene are insufficient to support a conviction. ***Id.*** at 627, 342 N.W. at 733.[4]

---

[4] Piaskowski also argues that each member of the conspiracy must have an individual stake in the venture. An individual stake is not a third element of conspiracy; a lack of stake in the venture does not absolve a

Although there is no evidence that Piaskowski directly killed Monfils by throwing him into the vat, the jury could reasonably infer that Piaskowski was part of the conspiracy to beat Monfils and cover up his death. The evidence establishes that Piaskowski was present at the confrontation and told the foreman that Monfils was missing and that "some heavy shit" was "coming down." There was also evidence that Piaskowski and the other defendants kicked and beat Monfils. From this evidence, it was reasonable for the jury to infer that Piaskowski played a larger role than that of a mere observer, that he took overt action to beat Monfils and cover up the murder when he reported Monfils as missing. The jury could reasonably infer that Piaskowski knew that Mofils was missing because he knew Monfils had been dumped into a vat.

A conspiracy continues "while the conspirators continue to be active in taking measures to prevent the discovery of the crime or the identity of those connected with its perpetration." ***Gelosi v. State***, 215 Wis. 649, 656, 255 N.W. 893, 896 (1934) (quoted source omitted). Further, when murder is committed under circumstances in which the victim's body must be disposed of to avoid detection, the conspiracy continues while the conspirators dispose of the body. *See* ***id.*** Piaskowski's role reasonably reflects a tacit agreement and intent to beat [7] Monfils and cover up the murder by disposing of Monfils' body. Sufficient evidence supports the jury's verdict, and inferences from that evidence are not unreasonable as a matter of law.[5] We therefore must

---

party to a crime of liability. ***State v. Hecht***, 116 Wis.2d 605, 627, 342 N.W.2d 721, 733 (1984).

[5] Because we conclude that sufficient evidence supports a conspiracy, we do not address whether the evidence is sufficient under ***Poellinger*** to prove that Piaskowski aided and abetted the murder.

reject Piaskowski's request for a new trial based on insufficiency of the evidence.

2. Newly Discovered Evidence

Piaskowski next asserts that the following newly discovered evidence entitles him to a new trial: (1) Brian Kellner recanted his trial testimony; and (2) David Wiener "virtually admitted" his involvement in Monfils' death. He insists the trial court applied the wrong legal standard when it assessed credibility rather than deciding if the new evidence would create a reasonable doubt at a new trial. We disagree.

At trial, Kellner testified that Kutska had told him that Hirn, Moore, Basten, Johnson, Piaskowski, Kutska and another individual were present at the confrontation with Monfils outside the No. 7 coop. In contrast, at the postconviction motions, he recanted this testimony and testified that Kutska's identification to him was not of those present at the confrontation, but of those individuals present in the No. 9 coop when the tape was being played. Contrary to his trial testimony, Kellner testified post-trial that the entire conversation occurred in the context of "what if."

Kellner testified that he felt the police had badgered him and that he had not agreed with everything Sergeant Randy Winkler, the investigating officer, [8] had put in his statement. At the post-trial hearing, however, Kellner testified that he gave untruthful answers at trial because the police threatened him with the loss of his children and job. Additionally, Kellner testified that he had experienced difficulties at his job since the trial because he had testified against fellow union members. He further testified post-trial that Kutska and Piaskowski were very close friends of his, and he felt he had been forced to testify against them.

Two Wisconsin cases provide the proper standard for reviewing a defendant's motion for a new trial based on a witness's recantation. *See* ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996); ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). A motion for a new trial based on a witness' recantation is entertained with great caution, and we submit the motion to the trial court's sound discretion. ***Terrance J.W.***, 202 Wis.2d at 496, 500, 550 N.W.2d at 447. We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the record. ***Id.***

To obtain a new trial based on newly discovered evidence, the moving party must establish, by clear and convincing evidence, that: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Id.*** In addition, when the newly discovered evidence must sufficiently corroborate the recantation before the defendant is entitled to a new trial. ***Id.*** at 500, 550 N.W.2d at 447. In this case, the trial court found that the first three requirements were met. In addressing the fourth requirement, the trial court found Kellner's reasons for his [9] recantation cumulative to evidence the jury heard at trial. Regarding the fifth requirement, the trial court found that the recantation was not credible and, therefore, concluded that there was no reasonable probability of a different outcome at a new trial.

Piaskowski maintains that under McCallum, the question under the fifth prong is whether the jury could find the recantation sufficiently credible to raise a reasonable doubt, not whether the trial judge personally believed the

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

App 9 and App 10

that Wiener killed his brother, Tim, to prevent him from revealing Wiener's role in the murder.

In its postconviction decision and order, the trial court applied the five requirements set forth in McCallum and concluded that newly discovered evidence regarding Wiener did not warrant a new trial court found the evidence met the first four requirements, it found that the fifth requirement was not met:

> Quite frankly, the testimony and affidavits submitted both in support of an in denial of defense's present contentions might be described as imaginative, resourceful, and innovative, but *in no event could the word "credible" be attached to them*. [E]vidence presented for that impeachment would interject a sideshow atmosphere that would have a tendency to, or indeed result in the creation of a full three-ring circus. (Emphasis added.)

Following the logic of McCallum, if a trial court finds newly discovered impeachment evidence not credible, it likewise leads us to conclude that the impeachment evidence would not lead to a difference result at a new trial. At postconviction motions, the trial court heard inmates Marcum, Wnek, and Grunkowski and had the opportunity to observe their demeanors and hear them [12] explain the context and circumstances in which these statements were made. In the trial court's opinion, these witnesses' testimony not only contained "gratuitous information" having little probative value, but the witnesses perhaps harbored "suspect agendas." The trial court's findings regarding the credibility of Wnek, Marcum, and Grunkowski were not clearly erroneous.

Based on our review of the voluminous record, it does not appear that Gawryleski gave live testimony at the

postconviction hearings. Nonetheless, the trial court did pass on the credibility of her affidavit. We will affirm the trial court's findings regarding Gawryleski's incredibility if the inference of incredibility may reasonably be drawn from her affidavit. *See* ***Eau Claire Press Co. v. Gordon***, 176 Wis.2d 154, 160-62, 499 N.W.2d 918, 920-21 (Ct. App. 1993).[8]

Gawryleski was living with Tim Wiener at the time David Wiener killed Tim. In her affidavit, she states that she overheard a telephone conversation during which Tim told David that "he was going to narc on him." She further states that she has always believed Tim was referring to David's involvement in the Monfils case and that in her opinion, "that is the reason or part of the reason that David shot him." Significantly, however, Gawryleski never heard Tim tell David [13] that he would "narc" on him specifically for David's alleged role in the Monfils' murder, yet she offers the opinion that this furnished part of the motive for Tim's murder. In contrast, she offers pure speculation that the potential "narc" dealt with Monfils' murder. For these reasons, the trial court could reasonably find her proposed testimony not only incredible, but also irrelevant. Thus, there is no reasonable probability that the introduction of such information at a new trial could lead a jury to have a

---

[8] Although there is some dispute whether we should defer to the trial court's findings relative to the affidavits, it is our opinion that the better rule is to defer to the reasonable inferences the trial court drew from these two affidavits. *See* Honorable Thomas Cane & Kevin M. Long, *Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts Into Fact-Finding Tribunals*, 77 MARQ. L. REV. 475, 488 (Spring 1994). This court is in no better position than the trial court to pass on the credibility of this documentary evidence. *See generally* ***id***. The trial court heard all the testimony in this 28-day trial and was in a superior position to draw reasonable inferences from these affidavits than this court. In our opinion, the documentary evidence exception to the clearly erroneous rule "turns appellate courts into fact-finding tribunals, wastes judicial resources, and lengthens the already arduous road to judicial finality." *See* ***id***. at 475-76.

reasonable doubt as to Piaskowski's guilt. Accordingly, we affirm the trial court's denial of a new trial based upon newly discovered evidence about Wiener.

3. Admission of Codefendant's Hearsay Statement

Piaskowski claims Kellner's trial testimony regarding his conversation with Kutska at the Fox Den Bar was inadmissible hearsay. Kellner testified that sometime between 8 and 10 p.m., Kutska began discussing the events of November 21, 1992, the day of Monfils' murder. Kellner further testified that Kutska described the playing of the tape in No. 9 coop, including the names of the people present at the time. The jury heard the following testimony:

> Q. Can you tell the jury who Mr. Kutska told you were present in the No. 9 coop after the tape had initially been played to Mr. Monfils?
>
> A. Yes, sir. There was Rey Moore, he was the last man in. There was Mike Johnson, Dale Basten, Keith, Jon Mineau, Mike Hirn.
>
> Q. Did he indicate anyone else?
>
> A. Yes, sir. He said there was two others, but I don't remember who they are.
>
> Q. What did he say occurred?
>
> A. He said that they played the tape. I don't know if the guys in the coop were getting would up about it and that they wanted to go confront Tom [Monfils] about it.
>
> . . .
>
> [14] Q. Do you recall Mr. Kutska telling you that Mike Piaskowski was in the coop at that time?

A. Yes, sir.

. . .

Q. So the people in the coop just after the playing of the tape or prior to their leaving the coop, the No. 9 coop, who were they?

A. Dale Basten, Mike Hirn, Rey Moore, Keith, John Mineau and Mike Piaskowski.

Q. And that's what Mr. Kutska told you on that occasion?

A. Yes, sir.

Kellner also testified that Kutska directed himself, Kellner's wife, and Kutska's wife in a role-play of the confrontation and explained events in the contest of "what if" situations. Kellner testified as follows:

Q. What did [Kutska] say happened?

A. He said that during this confrontation that somebody had come up and given Tom [Monfils] a slap upside the back of his head.

. . .

Q. Did Mr. Kutska ever indicate that Tom [Monfils] had been struck in any other manner at that time?
A. He did. That what if somebody had used a wrench or board or something from that area . . .

The trial court rejected the plaintiff's motion to suppress the testimony as hearsay and found the statements admissible as statements against interest. For that reason, it included an accomplice instruction in its preliminary instructions to the jury at the start of the trial. However, no cautionary or limiting instruction regarding the jury's use of

Kellner's testimony against any or all defendants was either requested or given directly before or after Kellner testified. Counsel for all defendants cross-examined Kellner regarding his recollection of the events, his state of intoxication, and the specifics of what Kutska said. Kutska [15] testified in his own defense, and counsel likewise examined him at length regarding his statement to Kellner and the events of November 21. Kutska denied ever having a conversation with Kellner at the Fox Den describing a confrontation or being involved in any role-playing.

Under § 808.01(3), STATS., hearsay is an out of court statement offered to prove the truth of the matter asserted. To be admitted, hearsay must satisfy one of the exceptions to the hearsay rule. Section 908.02, STATS. Generally, a decision on the admission of hearsay evidence is a matter within the trial court's sound discretion. ***State v. Stevens***, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). We will not reverse unless there has been a misuse of discretion or the trial court based its decision on an erroneous view of the law. ***Id.*** Whether a statement is admissible under a hearsay exception, however, is a question of law we review de novo. ***Id.*** at 112, 490 N.W.2d at 756.

We now turn to whether Kutska's statement was admissible under § 908.045(4), STATS., as an exception t §908.02, STATS., the hearsay rule. Under this section, an out-of-court statement is admissible if the declarant is unavailable and the statement is against the declarant's penal, societal, or pecuniary interest. ***State v. Buelow***, 122 Wis.2d 465, 474-76, 363 N.W.2d 255, 260-62 (Ct. App. 1984). The rationale for admission of statements against interest is that they possess circumstantial guarantees of trustworthiness based on the assumption that people do not falsely make damaging statements about themselves unless true. *See* ***Id.*** at 477, 363 N.W.2d at 262 (citing Advisory Committee Notes

on Proposed [16] Rules, 28 U.S.C. Rule 804(b)(3) (1982)), *rev'd on other grounds*, ***Buelow v. Dickey***, 847 F.2d 420 (8th Cir. 1988).[9]

The trial court found Kutska unavailable because he was named defendant in a criminal trial, and the State could not compel him to testify. Relying on ***State v. McConnohie***, 121 Wis.2d 57, 75-76, 358 N.W.2d 256, 265-66 (1984), Piaskowski argues that the declarant is not deemed unavailable unless he is called to the stand and actually invokes his Fifth Amendment privilege.[10] We disagree.

McConnohoie was charged, along with codefendant LaFrance, with party to the crime of armed robbery. LaFrance pled no contest tot he charge one day before McConnohie's trial. McConnohoie testified in his own defense and sought to introduce evidence that he heard LaFrance say that LaFrance and an individual named Serio committed the armed robbery. ***Id.*** at 61, 358 N.W.2d at 258. The court explained that at the time McConnohie attempted to testify to LaFrance's statement, § 908.045(4), STATS., was not applicable because there had been "no showing by the defendant of LaFrance's unavailability at the time the defendant testified. Although LaFrance possessed a fifth amendment privilege, it was not known that he would invoke that privilege until he as actually called." ***McConnohie***, 121 Wis.2d at 75-76, 358 N.W.2d at 265-66.

---

[9] Wisconsin's statement against interest exception is essentially the same as FED. R. EVID. 804(b)(3).

[10] The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself ..." The same protection is provided under the Wisconsin Constitution by art. I, § 8, which provides, "No person ... may be compelled in any criminal case to be a witness against himself ..."

[17] The declarant, LaFrance, was in a substantially different situation from Kutska. LaFrance, no longer a defendant, had entered a no contest plea and was awaiting sentencing at the time of McConnohie's trial. *See* ***id.*** at 61-62, 358 N.W.2d at 259. Importantly, because LaFrance no longer remained a codefendant, he could be called as a witness to determine whether he would claim the Fifth Amendment privilege and therefore be unavailable. In sharp contrast to McConnohie, Kutska had entered a not guilty plea and was in the midst of a jury trial on the charge at the time the statement was offered. It is elementary that under no circumstances could be State call Kutska as a witness to determine whether he would assert the Fifth Amendment privilege without incurring a mistrial. *See* U.S. CONST., AMEND. V. Therefore, he was unavailable.

Given that Kutska was unavailable, we next address whether Kutska's statement meets the criteria for a statement against interest under § 908.045(4), STATS. The statute provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> **(4)** STATEMENT AGAINST INTEREST. A statement which ... at the time of its making ... so far tended to subject the declarant to civil or criminal liability ... or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

A statement against interest need not amount to a confession, but it must tend to subject the declarant to criminal liability. ***Ryan v. State***, 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), overruled on other grounds by ***State v.***

Anderson, 141 Wis.2d 653, 416 N.W.2d 276 (1987). Piaskowski contends that Kutska's July 4, 1994, conversation with Kellner can be distilled to an exculpatory [18] statement, stating that "he merely watched what other people did during the confrontation." We disagree and conclude that because the statement was against Kutska's penal and societal interests, it was admissible.[11]

Whether a statement is against penal interest is determined under the circumstances existing at the time the statement was made. ***United States v. Hamilton***, 19 F.3d 350, 357 (7th Cir. 1994) (citing Advisory Committee Note to Rule 804(b)(3)). The record reveals that approximately two years had passed from the date of Monfils' murder to the time Kutska made the statements to Kellner. Although police had questioned Kutska on numerous occasions, they had made no arrests in the case and the investigation was still pending. Additionally, James River had discharged Kutska from his job, an Monfils' widow and children had named Kutska as a party in a civil wrongful death actions. Under the circumstances existing at the time Kutska made his statement to Kellner, the content and nature of the conversation were of the kind that would tend to subject Kutska to criminal charges, at least for party tot he crime of battery, if not homicide. Although Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation, a reasonable person would not untruthfully assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later.

We alternatively address whether the statements were against Kutska's societal interests. Two requirements must

---

[11] Because we conclude that the statements are admissible under § 908.045(4), we need not address the State's argument that the statements are admissible as prior inconsistent statements. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

be satisfied to admit a statement against societal interests: (1) the declarant must objectively face the [19] risk of hatred, ridicule, or disgrace; and (2) the declarant must subjectively appreciate the statement's propensity to subject him to such disgrace. ***Stevens***, 171 Wis.2d at 113-14, 490 N.W.2d at 757. We evaluate the statement from the standpoint of whether Kutska actually faced a risk of hatred, ridicule, or disgrace. "[T]he real issue is the extent of the declarant's personal connection to the activity reported in his or her declaration," as the declarant must have a personal interest in keeping the statement secret. ***Id.*** at 118, 490 N.W.2d at 759.

We have no difficulty concluding that Kutska's statement, in which he admitted his role in inciting a confrontation with Monfils and his presence at the confrontation, establishes a close personal connection to the events immediately before Monfils' murder. This is the type of statement that would objectively inspire hatred, ridicule, or disgrace if it became known in the larger community. Kutska couched his comments in terms of "what if" certain things had occurred, and this demonstrates that he appreciated the risk of social disapproval. Accordingly, we conclude that Kutska's statement was admissible under § 908.045(4), STATS., as a statement against both his penal and societal interests.

4. Severance

Piaskowski claims the trial court erred when it refused to sever his trial from Kutska's. He contends that because the State introduced an entire line of evidence against Kutska that did not apply to him, the plain language of § 971.12(3), STATS., mandates severance. Additionally, Piaskowski argues that Kutska's hearsay statements were inadmissible against Piaskowski, and that to the extend that Kutska's statements exculpated him by pointing the finger at

others, they were inadmissible because they were not statements against Kutska's penal or [20] societal interests. Finally, he argues that the trial court compounded its error by failing to give a limiting instruction. We affirm the court's denial of severance.

A trial court may try defendants together when they are charged with the same offense arising out of the same transaction and provable by the same evidence. ***State v. Brown***, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983). The decision whether to grant or deny a motion for severance is within the trial court's discretion, and we will not disturb its decision unless there has been a misuse of discretion. ***Id.*** Whether there has been a misuse of discretion is determined based on the facts of each case. ***Jung v. State***, 32 Wis.2d 541, 545-46, 145 N.W.2d 684, 686 (1966). We will affirm the trial court if there is a reasonable basis for its decision. ***State v. Nelson***, 146 Wis.2d 442, 456, 432 N.W.2d 115, 121 (Ct. App. 1988).

If it appears that a defendant is prejudiced by the joinder of his trial with other defendants, the court may grant a severance of defendants or provide whatever other relief justice requires. Section 971.12(3), STATS. If it appears during the course of trial that "an entire line of evidence" is produced that is only admissible as to one defendant and is unduly prejudicial to other defendants, then the trial court may order a severance at that time, or the court may elect to give the jury a cautionary instruction to the effect that "evidence against one may not be treated as evidence against all, simply because they are being tried together." ***State v. Jennaro***, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977) (quoting ***State v. DiMaggio***, 49 Wis.2d 565, 577, 182 N.W.2d 466, 473 (1971). Further, when evidence is admissible against all defendants, there is no prejudice

because the evidenee could be introduced at separate trials. ***Id.***

[21] Here, the trial court determined that because all defendants were charged with the same offense, as party to a crime, involving the same victim, the elements of the offense were provable by the same evidence, and it further concluded that the bulk of the evidence would have been presented against each defendant if tried separately. It recognized that some evidence would not apply to certain defendants and cautioned the jury as follows:

> Some evidence has been received in this trial which relates to one or more of the defendants, without having any reference to the remaining defendants. In considering and evaluating such evidence, you should exercise the utmost care and discretion. *Such evidence may be used only in considering whether the individual or individuals with whom it is concerned are guilty or not guilty. Such evidence must not be used or considered in any way against any of the other defendants who are not implicated by such evidence, either directly or by inference, except insofar as you may consider that evidence in connection with the instructions which have been given you regarding a conspiracy.* (Emphasis added.)

This instruction guarded against the risk that jurors would apply all evidence in a blanket fashion against all defendants. ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987) (we presume jurors follow such admonitory instructions).

We next address whether Kutska's hearsay statement mandates severance because it was admissible at trial only against Kutska. Under § 971.12(3), STATS., if the State intends to use the statement of a codefendant that implicates

another defendant in the crime charged, the judge shall grant a severance as to any such defendant. ***Id.*** The purpose of § 971.12(3) is to provide a mechanism to ensuring compliance with ***Bruton v. United States***, 391 U.S. 123 (1968), which prevents the use of a codefendant's statement inculpating another [22] defendant at a joint trial based on the codefendant's Sixth Amendment right to confront witnesses. ***Pohl v. State***, 96 Wis.2d 290, 301, 291 N.W.2d 554, 559 (1980). We conclude that the trial court did not misuse its discretion.

Kutska's statement was self-inculpatory and directly admissible against all of his codefendants under a firmly-rooted hearsay exception. *See* ***Williamson v. United States***, 512 U.S. 594, 601 (1994). The statement was made by a declarant-defendant in a social setting to a friend. In Kutska's conversation with Kellner, he did not engage in "finger-pointing" or specifically blame another person. He described the events of the confrontation in "what if" terms, saying "what if somebody had used a wrench or board or something from that area" to strike Monfils. Rather than making specific incriminating and inculpatory statement about his codefendants, he emphasized to Kellner that he knew who had hit Monfils but would not say who had done it.

The ***Williamson*** Court's comments are instructive:

> For instance, a declarant's squarely self-inculpatory confession . . . will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an

> accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.
>
> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. ... The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be [23] true," and this question can only be answered in light of all the surrounding circumstances.

Id. at 603-04 (citation omitted).

Kutska's description of the events establishes his involvement in a confrontation with Monfils close to the time of Monfils' murder. Each part of Kutska's statement to Kellner was self-inculpatory in nature and not an attempt to deflect Kutska's blameworthiness to others. Any of his statements tending to establish the presence or actions of any other persons are sufficiently closely connected to the inculpatory statements and satisfy the requirement of trustworthiness. Because Kutska's statement consisted of self-inculpatory statements, it was properly admissible as evidence, not only against Kutska, but also against Piaskowski. The trial court had a proper basis for denying severance and gave an appropriate cautionary instruction;

consequently, there was no misuse of discretion and we therefore affirm.[12]

[24] 5. Confrontation Clause Violation

Piaskowski next claims that the trial court improperly denied his request to cross-examine David Wiener regarding his alleged "deal" with the State and Wiener's resulting bias. At the time of trial, Wiener was serving a sentence for an unrelated homicide conviction. After hearing arguments outside the jury's presence, the court set parameters regarding cross-examination of the alleged deal. First, counsel could ask whether Wiener had a "deal" with the State, and, if so, counsel could "inquire into it." If there was no deal, then counsel could ask if Wiener expected to receive a deal. Second, the trial court concluded that the length of his

---

[12] In support of his argument, Piaskowski cites ***Cranmore v. State***, 85 Wis.2d 722, 739-40, 744, 271 N.W.2d 402 (Ct. App. 1978) for the proposition that defendant's out-of-court statement is inadmissible against a codefendant. We reject this argument. In ***Cranmore***, the court recognized that ***Bruton v. United States***, 391 U.S. 123 (1968), stands for the proposition that "the admission into evidence of a statement by one defendant, implicating a codefendant in that trial, where the declarant exercised his fifth amendment privilege not to testify was constitutionally impermissible." ***Id.*** at 744-45, 271 N.W.2d at 414. In other words, the court concluded that the confrontation clause was violated because the codefendant exercised his Fifth Amendment right; moreover, it noted that a cautionary instruction could not cure the violation. ***Id.*** Unlike in Bruton, here Kutska did not exercise his Fifth Amendment privilege; rather, he took the stand and was cross-examined.

In addition, even if the trial court committed error by denying the motion to sever, any error under § 971.12(3), STATS., and ***Bruton*** was consequently rendered harmless by Kutska's eventually testifying in his own defense and his codefendants' opportunity to cross-examine him concerning his alleged statements to Kellner naming them as participants in the confrontation with Monfils. *See* ***State v. King***, 205 Wis.2d 81, 94-95, 555 N.W.2d 189, 194-95 (Ct. App. 1996).

sentence and nature of his crime were irrelevant and collateral. Significantly, in response to the State's questions, Wiener testified on both direct and cross-examination that the State made him no promises in exchange for his testimony. When Basten's counsel asked if Wiener had directed his attorney to continue negotiations on his behalf, the trial court sustained the State's relevancy objection.

The scope of cross-examination for impeachment purposes is within the trial court's sound discretion, ***Rogers v. State***, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980), and we will affirm if there is a reasonable basis for the trial court's determination. ***State v. McCall***, 202 Wis.2d 29, 35, 549 N.W.2d 418, 421 (1996). When a witness believes that the State may benefit him if he shades his testimony, the defendant has a constitutional right to explore potential bias. ***Lindh v. Murphy***, 124 F.3d 899, 901 (7th Cir. 1997). However, a defendant's constitutional right to confrontation does not include the right to present irrelevant, immaterial, or prejudicial evidence. *See* ***McCall***, 202 Wis.2d at 44, 549 N.W.2d at 424. Courts should permit inquiry into crimes unrelated to its case when the State and the witness made a deal in exchange for the witness's testimony in the case [25] then before the court. *See* ***id.*** at 42, 549 N.W.2d at 423 (no misuse of discretion when the trial court concluded that "further inquiry into the existence of an alleged, though unproven agreement, would be wholly distracting and speculative"). In this case, Wiener's testimony that he had made no deal with the State provides a reasonable basis for the trial court's decision. The trial court properly prohibited further inquiry into this alleged, but unproven agreement. *See* ***id.*** There was no violation of Piaskowski's right to confrontation.

6. Exculpatory Evidence

Piaskowski argues the State failed to disclose it had information that a previous statement of Kellner's contained inaccuracies. About six weeks before trial, Kellner spoke to Piaskowski's investigator and told him that he had misgivings about the statement he had previously given to police. As a result, Kellner gave a new statement in which he indicated that all of Kutska's statements began with "What if" or "this is what the police thing." The State contends that it obtained a copy of the new statement and disseminated it to all defendants. Then, about a week before trial, Kellner met with the State to discuss the differences between the two statements. The State's failure to disclose the contents of this discussion form the basis of Piaskowski's objection.

Due process requires disclosure of evidence that is both favorable to the accused and material either to guilt or punishment. ***State v. Ray***, 166 Wis.2d 855, 870, 481 N.W.2d 288, 294 (Ct. App. 1992) (citing ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991)). Evidence is material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id.*** A reasonable probability is one "sufficient to undermine confidence in the outcome." [26] ***Id.*** While we agree that the new statement is favorable to Piaskowski, we conclude that it was not material.

Under the ***Brady*** materiality test, there is no reasonable probability that had the State given the information to Piaskowski, a different result would have occurred. Kellner still would have been subject to impeachment based on his several statements and the ultimate determination of believability would still have remained in the hands of the jury, which evaluates the

versions and decides which, if either, to believe. The inconsistencies in Kellner's second statement are not sufficient to undermine our confidence that the outcome would change. We recognize that disclosure of Kellner's misgivings would have been helpful to Piaskowski; however, the State is not under a constitutional obligation to provide Piaskowski with discovery of helpful, but nonexculpatory evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 628, 357 N.W.2d 12, 19 (Ct. App. 1984).

7. Randy Winkler's Personnel Records

Finally, Piaskowski asks this court to review Randy Winkler's sealed personnel records to determine whether they impeach his credibility. The trial court conducted an in-cameral review and determined that the records were irrelevant to Winkler's credibility.[13] In denying to turn the file over to the defense, the trial court noted that the file did not demonstrate any complaints or concerns about Winkler's investigation of the Monfils murder, but instead concerns [27] unrelated personnel matters. Further, the trial court found that Winkler's credibility was repeatedly attached during trial. Under ***State v. O'Brien***, 214 Wis.2d 327, 340, 572 N.W.2d 870, 876-77 (Ct. App. 1997), the party filing the postconviction request must convince the trial court, among other things, that the anticipated results of the postconviction discovery are relevant. ***Id.*** We review the trial court's relevancy finding for a misuse of discretion. ***Id.*** at 341, 572 N.W.2d at 877-78. As appellant counsel requested in his

---

[13] In his reply brief, Piaskowski argues for the first time that he has constitutional right to exculpatory evidence (here the personnel records) in the State's possession, citing ***Kyles v. Whitley***, 514 U.S. 419, 433-34 (1995), and ***Giglio v. United States***, 405 U.S. 150, 154 (1972). A party cannot raise an argument for the first time in a reply brief, so we decline to consider this argument. *See* ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 n.16 (Ct. App. 1990), rev'd on other grounds, 163 Wis.2d 1, 471 N.W.2d 216 (1991).

brief, we have reviewed Winkler's entire personnel file. After reviewing the file, we agree with the trial court's conclusion that its contents are irrelevant. Accordingly, we affirm the trial court's denial of Piaskowski's request for postconviction discovery.

By the Court. - Judgment and order affirmed.

Not recommended for publication in the official reports.

Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

No. 98-1556

In The

Supreme Court of the United States

October Term, 1998

MICHAEL L. PIASKOWSKI,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

CERTIORARI TO REVIEW A DECISION OF THE
WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION

JAMES E. DOYLE
Attorney General of Wisconsin

THOMAS J. BALISTRERI
Assistant Attorney General
Attorney of Record
Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

40 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE CREDIBLE EVIDENCE WAS SUFFICIENT TO CONVICT THE PETITIONER OF FIRST-DEGREE INTENTIONAL HOMICIDE. 1

II. THE ADMISSION OF THE EXTRAJUDICIAL STATEMENTS OF A CODEFENDANT AT THE PETITIONER'S TRIAL DOES NOT PRESENT AN ISSUE MERITING REVIEW BY THE SUPREME COURT. 11

A. The Petitioner Lacks Standing To Complain That His Right To Confrontation Was Denied. 11

B. Kutska's Prior Statements, Which Were Against His Penal Interest, Were Sufficiently Trustworthy That They Were Admissible Against All The Other Defendants Even In The Absence Of Confrontation..... 15

CONCLUSION 20

CASES CITED

Page

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 3, 4

Burks v. United States,
437 U.S. 1 (1978) 3

Durrett v. CIR,
71 F.3d 515 (5th Cir. 1996) 4

Gelosi v. State,
215 Wis. 649, 255 N.W. 893 (1934) 9-10

Guerra v. Johnson,
90 F.3d 1075 (5th Cir. 1996) 4

Harrison v. United States,
392 U.S. 219 (1968) 14

Jackson v. Virginia,
443 U.S. 307 (1979) 3

Kentucky v. Stincer,
482 U.S. 730 (1987) 12, 13

LaChance v. Erickson,
118 S. Ct. 753 (1998) 14

Lee v. Illinois,
476 U.S. 530 (1986) 13, 16, 19

Lockhart v. Nelson,
488 U.S. 33 (1988) 3

Page

Maryland v. Craig,
497 U.S. 836 (1990) 13

Mitchell v. United States,
141 F.3d 8 (1st Cir. 1998) 4

O'Neil v. State,
237 Wis. 391, 296 N.W. 96 (1941) 9, 11, 17

Patton v. United States,
688 A.2d 408 (D.C.),
cert. denied, 117 S. Ct. 1717 (1997) 14

Pollack v. State,
215 Wis. 200, 253 N.W. 560,
254 N.W. 471 (1934) 11, 18

Raines v. Byrd,
117 S. Ct. 2312 (1997) 11, 12, 14

Rodgers v. Western-Southern Life Ins. Co.,
12 F.3d 668 (7th Cir. 1993) 4

Scaria v. St. Paul Fire and Marine Ins. Co.,
68 Wis. 2d 1, 227 N.W.2d 647 (1975) 17

Schlup v. Delo,
513 U.S. 298 (1995) 3

State v. Bachmeyer,
247 Wis. 294, 19 N.W.2d 261 (1945) 11

State v. Denny,
163 Wis. 2d 352, 471 N.W.2d 606
(Ct. App. 1991) 16

Page

State v. Dyleski,
154 Wis. 2d 306, 452 N.W.2d 794
(Ct. App. 1990) 18

State v. Glenn,
199 Wis. 2d 575, 545 N.W.2d 230 (1996) 17

State v. Guiden,
46 Wis. 2d 328, 174 N.W.2d 488 (1970) 19

State v. Pharr,
115 Wis. 2d 334, 340 N.W.2d 498 (1983) 17

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990) 4

State v. Stevens,
171 Wis. 2d 106, 490 N.W.2d 753
(Ct. App. 1992) 18-19

State v. Zelenka,
130 Wis. 2d 34, 387 N.W.2d 55 (1986) 9

Steel Co. v. Citizens For A Better Environment,
118 S. Ct. 1003 (1998) 11

United States v. Bohle,
475 F.2d 872 (2d Cir. 1973) 14

United States v. Powell,
469 U.S. 57 (1984) 3

Whitmore v. Arkansas,
495 U.S. 149 (1990) 12, 14

Page

Williamson v. United States,
512 U.S. 594 (1994) 15, 16, 17

Zelenka v. State,
83 Wis. 2d 601, 266 N.W.2d 279 (1978) 18

STATUTES AND RULES CITED

Fed. Rule Evid. 804(b)(3) 15

Wis. Stat. § 908.045(4)
Rules of Evidence (1997-98) 19

Wis. Stat. § 939.05(2)(c) (1997-98) 11, 17

Wis. Stat. § 940.19 (1997-98) 8

Wis. Stat. § 940.23 (1997-98) 8

OTHER AUTHORITY CITED

Judicial Council Committee's Note,
59 Wis. 2d at R318 (1973) 17

No. 98-1556

In The

Supreme Court of the United States

October Term, 1998

MICHAEL L. PIASKOWSKI,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

CERTIORARI TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION

ARGUMENT

I. THE CREDIBLE EVIDENCE WAS SUFFICIENT TO CONVICT THE PETITIONER OF FIRST-DEGREE INTENTIONAL HOMICIDE.

The petitioner, Michael L. Piaskowski, asks this Court to decide whether his right to due process was violated when the Wisconsin Court of Appeals sustained his conviction of first-degree intentional homicide on the basis of

evidence which the trial court considered too incredible to support the conviction,

This question is not presented under the facts of this case because the trial court never made any such finding.

The joint trial of all six defendants in this case was to a jury, not the court.

In deciding the postconviction motion of codefendant Dale Basten,[1] the trial court found that "[a]t the conclusion of the State's case, there was more than adequate credible evidence which would have allowed the jury to find all defendants guilty." Decision and Order, Case No. 95-CF-00242, at 13-14, Respondent's Appendix at 8.

The trial court further determined that a new trial was not warranted by the partial recantation of prosecution witness Brian Kellner's trial testimony recounting statements of codefendant Keith Kutska about the events which led to the murder of Thomas Monfils.

In the context of the discussion of this issue, the court noted that Kellner committed perjury either at the trial when he gave his testimony or at the postconviction hearing when he recanted part of that testimony. *Id.* at 3, Appendix at 3. The court opined that Kellner's trial testimony was "barely credible," but credible nevertheless. *Id.* Obversely, the court had difficulty accepting Kellner's recantation as credible, and doubted that a jury would believe it. *Id.* at 4-5, Appendix at 5.

Thus, the trial court, while not giving the veracity of Kellner's trial testimony a solid endorsement, indicated that it was sufficiently credible for the jury to believe and rely on in reaching their verdicts.

---

[1]Basten was the first of the six defendants to file a postconviction motion. In deciding Piaskowski's separate postconviction motion, the court for the most part incorporated rulings it had made in the earlier motions of other defendants. Decision and Order, Case No. 95-CF-00239, at 7, Respondent's Appendix at 12.

But even if the trial court had found Kellner's trial testimony incredible, any such finding would be irrelevant on appellate review of the sufficiency of the evidence.

Under standards established by this Court, review to confirm whether the evidence was sufficient to support a criminal conviction involves an assessment of whether the evidence could support any reasonable determination of guilt beyond a reasonable doubt. *See United States v. Powell*, 469 U.S. 57, 67 (1984).

The question is not whether the reviewing court believes the defendant is guilty, but whether any rational trier of fact could have made that finding under the state law defining the offense on the evidence viewed in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979). All the favorable evidence, even any which has been admitted erroneously, must be considered. *See Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988).

It is the responsibility of the trier of fact to resolve conflicts in the evidence, weigh the evidence, and draw reasonable inferences from it. *See Jackson v. Virginia*, 443 U.S. at 319.

Thus, a court faced with a record of historical facts which support conflicting inferences must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. *See id.* at 326.

If there is a plausible account of the evidence which supports the conclusion of the trier of fact, a reviewing court may not reverse even though as factfinder it would have weighed the evidence differently and come to a different conclusion. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

More important here, an assessment of the credibility of the witnesses is generally beyond the scope of the review. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995). Even the trial court, which has heard the testimony itself, is not to assess the credibility of the witnesses or weigh the evidence in reviewing the sufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 16 (1978).

The credibility of testimony may be second-guessed only in the very rarest of circumstances, *see Durrett v. CIR*, 71 F.3d 515, 517 (5th Cir. 1996), where it is contradicted by indisputable documentary or physical evidence, or is so inherently inconsistent or implausible on its face that no reasonable factfinder could believe it. *See Anderson v. City of Bessemer City*, 470 U.S. at 575. *See also Mitchell v. United States*, 141 F.3d 8, 17 (1st Cir. 1998); *Guerra v. Johnson*, 90 F.3d 1075, 1079 (5th Cir. 1996); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993).[2]

Piaskowski does not appear to assert that the trial court ruled Kellner's testimony was incredible as a matter of law. He asserts only that the court "considered" the testimony "too incredible" to support his conviction, Petition for Certiorari, Questions Presented, suggesting that the judge made his own subjective assessment of Kellner's credibility, and found it insufficient to convince him.

But applying the rules discussed above, if a trial court improperly substitutes its own view of the credibility of testimony which the jury could have lawfully found credible, an appellate court, in reviewing the sufficiency of the evidence de novo, may simply ignore the finding which the trial court had no right to make.

Moreover, even if a trial court concludes in its review of the jury's verdict that evidence is incredible as a matter of law, that ruling, like any other legal conclusion of a lower court, is subject to reversal if the appellate court determines that it is erroneous.

So even if Piaskowski had asserted that the trial court ruled Kellner's testimony was incredible as a matter of law, he would still not have shown any constitutional defect in his

---

[2]Wisconsin employs the same standards on appellate review of the sufficiency of the evidence. *See State v. Piaskowski*, No. 97-2104-CR, slip op. at 2-3, Petitioner's Appendix at 2-3 (Wis. Ct. App. Sept. 22, 1998) (citing *State v. Poellinger*, 153 Wis. 2d 493, 506-08, 451 N.W.2d 752, 757-58 (1990)).

conviction for he makes no argument that the state appellate court could not have properly reversed any such ruling.

With Kellner's testimony thus subject to the usual rule that credibility is no concern of either a trial or appellate court reviewing the sufficiency of the evidence, the court of appeals properly concluded that the evidence of record was sufficient to convict Piaskowski of first-degree intentional homicide as a party to the crime.

No single witness provided evidence which proved by itself that Piaskowski was involved in a conspiracy to kill Thomas Monfils. But sifting and winnowing the testimony of the various witnesses who testified in this twenty-nine day trial, drawing reasonable inferences from the testimony they believed, and putting it all together, the jury could have reasonably found that the police received an anonymous call reporting that Keith Kutska, an employee at the James River paper mill in Green Bay, was going to steal an expensive electrical cord at the end of his work shift. Transcript (9/28/95) at 23-26.[3]

A security guard at the mill tried to stop Kutska when he left work, but Kutska bolted out the door without letting the guard inspect his bag. *Id.* at 32-33. Because of his evasion, he was suspended for five days. Transcript (10/12/95) at 217-18.

Kutska was upset about the suspension and decided to find out who snitched on him. Transcript (10/16/95) at 239-41; (10/17/95 PM) at 63-65.

Despite the fact that Kutska had stolen the cord, Transcript (10/12/95) at 214-15, he asked the police for a recording of the anonymous call so he could "clear his name." Transcript (9/28/95) at 40, 43. And despite the fact that the informant called again and pleaded with the police not to release the recording because he feared his voice would be

---

[3]The respondent has included citations to the record to show that every statement of fact can be documented. Because the transcripts are voluminous, however, the respondent hesitates to send them unless the Court deems them necessary to decide this petition. The respondent will of course promptly provide any and all transcripts needed by the Court.

recognized, the police gave Kutska a copy of the tape. Transcript (9/28/95) at 43, 46, 49-50, 54; (10/16/95) at 241-42.

Kutska immediately recognized the voice on the recording as that of Thomas Monfils. Transcript (10/16/95) at 243.

Shortly after seven the next morning, Kutska confronted Monfils with the tape in the control room or "coop" of the number seven paper machine at the James River mill. Transcript (10/12/95) at 259-62.[4] Monfils admitted it was his voice on the recording. *Id.* at 262-63.

Kutska then played the tape in the coop of the neighboring number nine machine for a group which included Dale Basten, Michael Hirn, Michael Johnson, Reynold Moore, and Michael Piaskowski. Transcript (10/4/95) at 239-40; (10/5/95) at 3-6.

Kutska implied that he did not take the cord, and was falsely accused by Monfils. Transcript (10/17/95 AM) at 46-47. He told Moore and Hirn, a good instigator, that they should give Monfils some "shit" for snitching on a fellow union brother. Transcript (10/5/95) at 8; (10/16/95) at 262; (10/17/95 PM) at 83-84. *See* Transcript (9/28/95) at 142; (10/6/95) at 300.

The men in the number nine coop became ever angrier as each of them fed off the comments made by another. Transcript (10/2/95) at 31, 115; (10/3/95) at 84-85; (10/18/95) at 33-34; (10/19/95 AM) at 118; (10/19/95 PM) at 66. Finally they decided to let Monfils know how they felt about Kutska's suspension. Transcript (10/5/95) at 7, 75-76.

Monfils left the number seven coop to perform a periodic operation known as a "turnover." Transcript (9/28/95) at 147-49. When he finished about 7:35 a.m., he was surrounded and confronted near the bubbler across from the paper machines by the entire group from the neighboring control room. Transcript (9/29/95) at 82; (10/5/95) at 7-8, 63,

---

[4]A floor plan of the areas of the paper mill where the events in this case took place is included in the Appendix at 13.

102, 218; (10/12/95) at 276; (10/13/95) at 169-70; (10/14/95) at 38-39; (10/17/95 AM) at 60.

They started hollering and swearing at Monfils. Transcript (10/5/95) at 9, 77. Him shoved him. Transcript (10/5/95) at 12; (10/13/95) at 130-32. Kutska punched him in the face. Transcript (10/13/95) at 170. Moore hit him on the back of the head. Transcript (10/5/95) at 10; (10/13/95) at 131-32, 170-71. Then everyone joined in kicking and beating him. Transcript (10/13/95) at 169-70, 182.

Monfils suffered numerous injuries to his head, neck, chest and abdomen, including a depressed fracture on the back of his skull. Transcript (10/4/95) at 185-98, 204, 208. At the end of the attack, he was unconscious but alive, lying there curled up in a ball. Transcript (10/4/95) at 222; (10/13/95) at 183.

About 7:40 a.m., David Wiener observed Basten and Johnson in an area which connects the paper machines with the vat or "dump chest" which supplies paper pulp to the machines. Transcript (9/29/95) at 225; (10/4/95) at 60; (10/6/95) at 128; (10/9/95) at 94-97. Johnson was walking backwards, about five or six feet ahead of Basten. Transcript (10/9/95) at 98. Both were bent over, and appeared to be carrying something, although Wiener could not see what it was. *Id.* at 98-99. They were heading south, toward the vat. Transcript (10/4/95) at 60; (10/9/95) at 100.

About 7:45 a.m., Kutska, Piaskowski and Moore entered the number seven coop. Transcript (9/28/95) at 156-57; (9/29/95) at 21; (10/11/95) at 92-93.

Kutska told Piaskowski to notify a supervisor that Monfils was missing. Transcript (9/28/95) at 159. Piaskowski told the supervisor that "[s]ome heavy shit [wa]s coming down." Transcript (10/3/95) at 207-09, 216; (10/11/95) at 99-101. A search for Monfils began. Transcript (10/2/95) at 228; (10/3/95) at 221-29.

Monfils's body was found when the pulp vat was drained. Transcript (10/4/95) at 16, 157. A weight which had been kept near the number seven machine was tied around his

neck with a rope from the same location. Transcript (9/29/95) at 4-7; (10/4/95) at 159-60, 172-73.

Monfils was unconscious but alive when he was thrown into the vat. Transcript (10/4/95) at 177-78, 222. He died by asphyxiation due to aspiration of paper pulp and ligature strangulation. *Id.* at 177-78, 200.

After the body was found, Basten kept coming to Wiener's work area to determine what could be seen from the table where Wiener had been sitting, and to find out what Wiener knew. Transcript (10/9/95) at 112-14, 207, 228-33; (10/10/95 AM) at 60-61. He suggested that Monfils could have suffered a specific injury which had not been made public. Transcript (10/10/95 PM) at 26-28.

When Basten was questioned by the police, he started to cry, and said he did not mean to kill Monfils. Transcript (10/13/95) at 240.

After his arrest, he called Wiener a "fuckin' squealer," Transcript (10/13/95) at 127-28, and said he should have left town when the police started questioning him because now they knew for a fact that "we did the shit." *Id.* at 124.

Because all six men who participated in the beating were subject to dismissal from their jobs, *see* Transcript (10/10/95 PM) at 17, not to mention prosecution for a serious felony, *see* Wis. Stats. §§ 940.19, 940.23 (1997-98), they all had a strong motive for disposing of the evidence of their rage, i.e., the person who could tell his employer and the police about the beating, and whose severely beaten body provided incontrovertible physical evidence of that fact.

Because two of those men, Basten and Johnson, were carrying something about the length of a body from the area where Monfils was beaten toward the vat where his body was found, in the brief interval between the time he was beaten and the time he was reported missing, the jury could reasonably infer that they were carrying the injured and unconscious Monfils to the vat.

Because Basten and Johnson carried Monfils to the vat, and because Basten by word and deed virtually admitted his responsibility for Monfils's death, the jury could reasonably

infer that they were the ones who threw him in. Since Monfils was unconscious with a heavy weight roped around his neck, the jury could reasonably conclude that Basten and Johnson intended to kill him when they threw him into the mucky pulp.

Although Piaskowski did not directly kill Monfils, he was equally liable for the homicide as a party to the crime.[5]

The jury could have reasonably inferred that Piaskowski was a party to a conspiracy to severely beat Monfils.

Under substantive Wisconsin law,

> "A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty actionable combination. . . . Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators . . . or their, even, all knowing . . . the precise thing to be accomplished or plans for its accomplishment . . . being distinctly stated by any member of the combine to any other member."

O'Neil v. State, 237 Wis. 391, 404-05, 296 N.W. 96, 102 (1941).

Since all six men incited by Kutska participated in the confrontation and beating of Monfils, it could reasonably be inferred that all six agreed with each other that he should be beaten because he was a snitch.

A conspiracy continues while the conspirators take active measures to prevent discovery of the crime or those connected with its commission. *See Gelosi v. State*, 215 Wis.

---

[5]The case was submitted to the jury on both the conspiracy and aiding-and-abetting theories of party-to-a-crime liability. Transcript (10/26/95) at 10-12. The prosecutor argued that Piaskowski was guilty under both theories. *Id.* at 140. Under state law, these are simply different manners of participating in the same offense about which the jury does not have to unanimously agree. *See State v. Zelenka, 130 Wis. 2d 34, 47, 387 N.W.2d 55, 61 (1986).*

649, 655-56, 255 N.W. 893, 895-96 (1934). So when a crime is committed under circumstances where a body must be disposed of to avoid detection, the conspiracy persists until the disposition is accomplished. *See id.*

Here, the jury could have reasonably found that the conspiracy among those who confronted and beat Monfils persisted until he was disposed of to avoid detection. All six contributed to the mass of injuries which provided the same motive for all of them to erase the evidence of their mutual misdeeds. They all had a powerful reason to continue to act together, therefore, after the beating was completed.

It can reasonably be inferred that Kutska, Piaskowski and Moore, who were there when Monfils was beaten and were still together afterwards, knew what happened to Monfils. They returned to the number seven coop a few minutes after Monfils was dragged to the vat, suggesting they remained at the scene of the beating while Monfils was removed. When they returned, Piaskowski told a supervisor at Kutska's direction that Monfils was missing and some "heavy shit" was coming down. They could not have known so soon that Monfils was missing because of some "heavy shit" unless they knew he was dumped in the vat.

Yet knowing that Monfils was thrown into a pulp vat where he would surely die, neither Kutska, Piaskowski nor Moore made any effort to prevent his death by alerting anyone to the nature of his fate. Their collective silence under these circumstances suggests they all agreed that Monfils should be killed.

Under these circumstances, it could reasonably be inferred that all the original conspirators, including Piaskowski, agreed at least tacitly after the beating to dispose of both the physical evidence of the beating and the witness who could cost the persons who beat him their jobs and their freedom by throwing Monfils into the pulp vat where he would die and his body would soon decompose into inconspicuous paper pulp.

One who tacitly consents to the object of a conspiracy is guilty even though he intends to take no active part in the crime, but stands by while others put the common plan into

effect. *See O'Neil v. State*, 237 Wis. at 405, 296 N.W. at 102. Each conspirator is criminally responsible for the acts of any associates, which become the acts of all. *See State v. Bachmeyer*, 247 Wis. 294, 299, 19 N.W.2d 261, 263 (1945); *Pollack v. State*, 215 Wis. 200, 212, 214, 253 N.W. 560, 565, 254 N.W. 471 (1934).

And although Piaskowski's culpability may not have been as great as some other members of the conspiracy, he is still guilty of first-degree intentional homicide since each conspirator is guilty of the same offense as the direct perpetrator of the crime. *See id.*; Wis. Stat. § 939.05(2)(c) (1997-98).

The evidence adduced at the trial was sufficient to permit the jury to find that Basten intentionally killed Monfils by throwing him into a pulp vat with a weight around his neck to conceal the severe beating he had suffered at the hands of Basten and his companions, and that Basten's companion Piaskowski was a party to this crime.

II. THE ADMISSION OF THE EXTRAJUDICIAL STATEMENTS OF A CODEFENDANT AT THE PETITIONER'S TRIAL DOES NOT PRESENT AN ISSUE MERITING REVIEW BY THE SUPREME COURT.

A. The Petitioner Lacks Standing To Complain That His Right To Confrontation Was Denied.

The party invoking the jurisdiction of a federal court has the burden to establish that the court has jurisdiction. *See Steel Co. v. Citizens For A Better Environment,* 118 S. Ct. 1003, 1016-17 (1998). This Court has always insisted on strict compliance with this requirement. *See Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997).

To establish jurisdiction, the party must show that he has standing to sue. *See id.* And to show standing, he must clearly and specifically set forth facts sufficient to show that he has personally suffered an injury, fairly traceable to the opponent's unlawful conduct, and likely to be redressed by the requested relief. *See id.*; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The alleged injury must be both qualitatively and temporally concrete. *See Whitmore v. Arkansas*, 495 U.S. at 155. The injury must be palpable rather than abstract. *See id.* And the harm must be actual rather than hypothetical. *See id.*

Futhermore, the alleged injury must be legally and judicially cognizable, so it must be caused by an invasion of a legally protected interest. *See Raines v. Byrd*, 117 S. Ct. at 2317.

The Confrontation Clause is violated when hearsay is admitted as substantive evidence with no opportunity to cross-examine the declarant at the trial. *See Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). Obversely, this provision is not violated by the admission of an out-of-court statement as long as the declarant testifies as a witness and is subject to cross-examination. *See id.* at 737-38.

Piaskowski has no standing to argue in a federal court that his right to confrontation was denied when the extrajudicial statements of codefendant Keith Kutska were admitted at their joint trial because Piaskowski confronted and cross-examined Kutska.

Kutska testified at the trial. Transcript (10/16/95) at 232 et seq. Kutska addressed the subject matter of his prior statements in his testimony. *Id.* at 263-70. And Piaskowski cross-examined Kutska about the statements attributed to him. Transcript (10/17/95 AM) at 44-45.

Thus, Piaskowski suffered no actual, palpable injury to his right to confrontation as the result of the admission of Kutska's extrajudicial statements.

Piaskowski argues that he was prejudiced because he would have obtained a directed verdict of acquittal at the close of the state's case if Kutska's statements had been

barred under the Confrontation Clause during the state's case. But this contention confuses hearsay and confrontation objections to the admission of evidence.

If evidence is inherently inadmissible under a rule prohibiting hearsay, the rule is violated as soon as the evidence is erroneously introduced.

But as noted above, there are two necessary aspects to a confrontation violation, admission of hearsay and absence of cross-examination of the declarant. *See Kentucky v. Stincer*, 482 U.S. at 737-38. Thus, there can be no violation of the right to confrontation unless and until the party against whom an extrajudicial statement is admitted has been denied any opportunity to confront and cross-examine the declarant. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986). This could occur if the declarant is subsequently called to the stand and refuses to testify, *see id.*, or if he is not available to be called during any portion of the trial.

As long as the declarant testifies and is available for cross-examination, however, there is nothing in the Confrontation Clause which distinguishes between confrontation of the declarant during the state's case or confrontation during the presentation of the defense evidence. The critical consideration is that the party against whom a statement is introduced has a full and fair opportunity to probe testimonial infirmities such as forgetfulness, confusion or evasion through cross-examination of the person who supposedly spoke those words, under oath, before the jury which can observe the demeanor of the speaker, at some point during the trial itself. *See Maryland v. Craig*, 497 U.S. 836, 845-47 (1990); *Kentucky v. Stincer*, 482 U.S. at 737-38.

Piaskowski also appears to argue that his confrontation of Kutska somehow does not count because Kutska was forced to take the stand due to the admission of his prior statements. But it is hard to see how this fact, even if true, could endow Piaskowski with standing to claim that his right to confrontation was violated.

In *Harrison v. United States*, 392 U.S. 219, 222-23 (1968), this Court held that the government could not use against a defendant testimony he had given at a previous trial, when he testified at that trial only because his illegally procured confessions had been introduced first, thereby tainting his testimony as the fruit of a poisonous tree.

Harrison does not apply, however, when there is a claim that a defendant decided to testify because of the erroneous admission of hearsay evidence since neither the exclusionary rule nor its corollary fruits doctrine apply to alleged procedural error in the admission of evidence as distinguished from constitutional error in the procurement of evidence. *See Patton v. United States*, 688 A.2d 408, 411-12 (D.C.), *cert. denied*, 117 S. Ct. 1717 (1997) (citing *United States v. Bohle*, 475 F.2d 872, 875-76 (2d Cir. 1973), and other cases).

Besides, even if Kutska's rights had been violated by forcing him to testify in response to the admission of his extrajudicial statements, it would not help Piaskowski since, to establish standing, a defendant must show a violation of his own rights, not those of some third party. *See Raines v. Byrd*, 117 S. Ct. at 2317; *Whitmore v. Arkansas, 495 U.S. at 155.*

In any event, the record shows that Kutska did not decide to testify only because his prior statements had been introduced by the prosecution, but was planning to take the stand all along.

The introduction of Kutska's statements at the criminal trial could not have provided compulsion for him to testify at the earlier deposition in the civil case brought by Monfils's widow, yet he did testify there about the subject matter of his statements, Transcript (10/12/95) at 282-90, despite the fact that he could have refused to testify at all in reliance on his privilege against self-incrimination. *See LaChance v. Erickson*, 118 S. Ct. 753, 756 (1998).

Furthermore, Kutska did not limit his trial testimony to rebutting the statements the prosecution had introduced. Rather, he gave a full account of his version of events. *See*

Transcript (10/16/95) at 232 et seq. It was only at the end of his direct testimony that he addressed the assertions which had been attributed to him by a witness for the state. Transcript (10/17/95 AM) at 23. The very nature of Kutska's testimony thus suggests that the introduction of his prior statements played little if any role in his decision to testify at the criminal trial.

Moreover, all six defendants took the stand in their own defense at trial. Transcript (10/16/95) at 232 et seq.; (10/18/95) at 14 et seq.; (10/19/95 AM) at 81 et seq.; (10/19/95 PM) at 137 et seq.; (10/21/95) at 46 et seq.; (10/24/95) at 63 et seq. This unanimous decision to testify strongly implies that Kutska's reason for testifying was not unique, and that all the defendants had the same motive to get their version of the story heard.

Piaskowski's claim that he was denied his right to confrontation presents no case or controversy within the jurisdiction of this Court.

B. Kutska's Prior Statements, Which Were Against His Penal Interest, Were Sufficiently Trustworthy That They Were Admissible Against All The Other Defendants Even In The Absence Of Confrontation.

In *Williamson v. United States*, 512 U.S. 594 (1994), this Court construed the federal rule of evidence which creates a hearsay exception for statements against interest to apply only to those parts of a statement which are actually against the interest of the declarant. Under the Court's construction, Fed. Rule Evid. 804(b)(3) does not allow admission of non-self-inculpatory parts of a broader statement which is inculpatory. *See Williamson v. United States*, 512 U.S. at 599-601.

In *Williamson*, this Court found it unnecessary to address the defendant's additional claim that the statements introduced against him were also inadmissible under the Confrontation Clause. *See id.*, 512 U.S. at 605. In particular, the Court declined to decide whether the hearsay exception for declarations against penal interest was so firmly rooted as to dispense with the need for confrontation of the declarant, although it noted that "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* (citing *Lee v. Illinois*, 476 U.S. at 543-45).

There is no need for the Court to reach the unresolved constitutional issues in this case for, in addition to the fact that Piaskowski did confront and cross-examine Kutska about his prior statements at the trial, all parts of the statements which were admitted in evidence were sufficiently trustworthy to dispense with the need for confrontation.[6]

Kutska's statements were not confessions resulting from police interrogation of an arrested defendant. Rather, they were volunteered to a group of friends at a social event. Transcript (10/4/95) at 237-40. So they are not less credible than ordinary hearsay because of any motivation of the declarant to exonerate himself at the expense of another defendant. *See generally Lee v. Illinois*, 476 U.S. at 541.

Although they did not amount to an admission that he killed Monfils, Kutska's assertions that he played the tape of Monfils's police call for his union brothers, that he encouraged his brothers to give Monfils "shit," that "they" decided to confront Monfils about the tape, that "they" surrounded Monfils at Kutska's direction, that "they" started yelling and swearing at Monfils, that at least two of the group hit Monfils

---

[6]Wisconsin courts have ruled that statements against interest are a firmly-rooted hearsay exception, so reliability can be inferred. *See State v. Denny*, 163 Wis. 2d 352, 358, 471 N.W.2d 606, 609 (Ct. App. 1991). The respondent agrees with this ruling, but sees no need to have it seconded by the Supreme Court.

while Kutska was present, and that Kutska did nothing to stop or even evince disapproval of either the verbal or physical attacks, Transcript (10/4/95) at 239-40; (10/5/95) at 3-20, 63, 75-76, strongly tended to subject him to criminal liability as a party to a conspiracy to commit a battery on Monfils.

One who tacitly consents to the object of a conspiracy and goes along with the other conspirators is guilty although he takes no active part in the crime but stands by while others put the conspiracy into effect. *See O'Neil v. State*, 237 Wis. at 404-05, 296 N.W. at 102.

Worse, since a party to a conspiracy may also be liable for any death which results as a natural and probable consequence of the intended offense, *see State v. Pharr*, 115 Wis. 2d 334, 349-50, 340 N.W.2d 498, 505 (1983); Wis. Stat. § 939.05(2)(c) (1997-98), Kutska's admission of participation in a conspiracy to commit a battery tended to subject him to liability for Monfils's death as a party to that naturally consequential crime. *Cf. State v. Glenn*, 199 Wis. 2d 575, 586-89, 545 N.W.2d 230, 234-36 (1996) (party to aggravated battery liable for death caused as natural consequence).

These statements had enough tendency to subject the declarant to criminal liability that a reasonable person would not have made them if they were not true, as convincingly evinced by Kutska's continuing efforts to disavow them in his own testimony. Transcript (10/17/95 AM) at 23, 44-45. The applicable reasonable person standard, *see* Judicial Council Committee's Note, 59 Wis. 2d at R318 (1973), is objective, *see Scaria v. St. Paul Fire and Marine Ins. Co.*, 68 Wis. 2d 1, 15, 227 N.W.2d 647, 655 (1975), and objectively Kutska's statements were inculpatory.

Kutska's incriminating statements could not be separated into some assertions which exclusively inculpated him and other assertions which only inculpated others.

Rather, the statements inculpating all the defendants were inexorably entwined since it was Kutska's involvement as a party to the criminal acts committed by the other defendants which incriminated him. *See Williamson v. United States*, 512 U.S. at 603. It was because the other defendants committed

criminal acts in the course of a conspiracy which led to Monfils's death that Kutska's participation in the conspiracy tended to subject him to criminal liability. *See id. See generally Pollack v. State*, 215 Wis. at 214, 253 N.W. at 566 (each conspirator criminally responsible for acts of any associates which become acts of all).

Kutska claimed that he left before the beating of Monfils was completed. But a party to a conspiracy cannot absolve himself of liability for the acts of his accomplices so easily.

> "A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward because, as the result either of fear or even of a better motive, he concludes to run away at the very instant when the act in question is about to be committed and when the transaction which immediately begets it has actually been commenced."

Pollack v. State, 215 Wis. at 212, 253 N.W. at 565. *Accord State v. Dyleski*, 154 Wis. 2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990); *Zelenka v. State*, 83 Wis. 2d 601, 621, 266 N.W.2d 279, 288 (1978).

A reasonable person in Kutska's position would have realized that any criminal acts he suggested his coconspirators committed after he claimed to have left them still inculpated him as well because he was still a member of their conspiracy. So when Kutska implied that all the other conspirators continued beating Monfils after he left, Transcript (10/5/95) at 218, he was inculpating himself as well as his companions in the continuation of the assault.

In addition to statements against penal interest, extrajudicial statements which tend to make the declarant an object of hatred, ridicule or disgrace are admissible under a different provision of the Wisconsin hearsay exception for statements against interest. *See State v. Stevens*, 171 Wis. 2d

106, 112, 490 N.W.2d 753, 756-57 (Ct. App. 1992); Wis. Stat. § 908.045(4), Rules of Evidence (1997-98).

A statement admitting responsibility for initiating a physical confrontation with an innocent man who was horribly murdered only minutes later would plainly tend to make the declarant an object of hatred or disgrace in the eyes of the community at large if it became known. And this additional reason for not making statements which were not true bolsters the reliability of Kutska's statements against his penal interest.

The reliability of Kutska's statements was further supported by the testimony of another witness recounting the statements of a different coconspirator which corroborated Kutska's account of the confrontation leading to Monfils's death. Transcript (10/13/95) at 130-31, 170, 181-83.

Piaskowski suggests that Kutska's statements were not reliable because they were made while both the declarant and the witness were drinking.

But the witness, Brian Kellner, testified that he did not have that much to drink since beer made him sick. Transcript (10/4/95) at 233-35. Kellner said that by the time Kutska started talking about the confrontation of Monfils, he had switched to drinking 7-Up. *Id.* at 237-38.

As far as the declarant, there is no evidence that Kutska was so drunk he did not know what he was saying. Rather, it appears he had reached "the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions," *State v. Guiden*, 46 Wis. 2d 328, 331, 174 N.W.2d 488, 490 (1970), so that he lost his natural reluctance to incriminate himself to his friends.

Kutska's statements against his penal interest were directly admissible against all the other defendants without violating anyone's right to confrontation because they carried particularized guarantees of trustworthiness which permitted their admission whether or not statements against interest constitute a firmly rooted hearsay exception. *See generally Lee v. Illinois*, 476 U.S. at 543.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES E. DOYLE
Attorney General of Wisconsin

THOMAS J. BALISTRERI
Assistant Attorney General
Attorney of Record
Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

INDEX TO APPENDIX

Document	*Page of Appendix*
Excerpt of Decision and Order in *State v. Dale M. Basten*, Case No. 95-CF-00242	1-9
Excerpt of Decision and Order in *State v. Michael Piaskowski*, Case No. 95-CF-00239	10-12
Floor Plan of Areas of Paper Mill	13

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff(s)

-vs- Case # 95 CF 00242

DALE M. BASTEN,

Defendant(s)

DECISION AND ORDER

Defendant Basten has requested this Court to grant him a new trial, setting forth several grounds in reliance thereon. The Court is also asked to reverse the conviction as it was unsupported by sufficient evidence. Several of the grounds have previously been raised, others are new at this time. After having considered the arguments of counsel and briefs filed in support of the motions, this Court must deny both motions. The reasons therefor will be set forth in the same order as they were advanced in defendant's brief.

NEWLY-DISCOVERED EVIDENCE

The oral argument and testimony presented at the motion hearing focused heavily on the recantation of Brian Kellner. It was also strenuously argued that newly-discovered evidence reveals David Wiener, another prosecution witness, gave false testimony. At trial, Brian Kellner, a co-worker of the several defendants in the consolidated cases, testified to an incident which occurred on the July 4th weekend in 1994 at the Fox Den bar. At the motion hearing on February 12 and 13, Mr. Kellner recanted a portion of his trial testimony. He now says the answers he gave in response to questions as to the identity of individuals at the "bubbler" confrontation

were not truthful. He states he gave untruthful testimony because he had been threatened by one of the investigating officers, feared that he would go to jail and lose his children if he did not testify as he did and also felt that his testimony at the time did not matter. Testimony was presented at the February motion hearing concerning the reasons for Mr. Kellner's fears, that testimony being concerned chiefly with the interrogation methods used by Sergeant Winkler of the Green Bay Police Department. The State presented testimony contradicting Mr. Kellner's present testimony. Clearly the testimony given at trial and the testimony now proffered by Mr. Kellner is at odds. The question is does it constitute such newly-discovered evidence as would justify a new trial. State v. McCallum, 198 Wis. 2d 149, 542 N.W.2d 184 (Ct.App. 1995) sets forth the guidelines for this Court to follow in making its determination.

Mr. Kellner's recantation is evidence which has come to defendant's knowledge after trial and the defendant was not negligent for failing to discover it prior to the pending motions. Indeed, it did not exist until the actual change of heart by Mr. Kellner. The questions this Court must resolve are whether the evidence is material to the issue, whether it is merely cumulative to previous testimony and whether it is reasonably probable that a different result would be reached in a new trial. It is also necessary that the recantation be corroborated by other newly-discovered evidence.

Kellner's testimony was the subject of motions prior to trial. As the defense brief mentions, the State argued during the July 9, 1995 motion hearings that Mr. Kellner's testimony was of great consequence. That underlying assumption is made throughout the defense's position at this time. It is suggested the testimony of Kellner was crucial and the testimony of David Wiener, which will be discussed later, was the most critical testimony presented.

Before addressing the issues presented, the Court should point out that the testimony of Kellner and Wiener, as presented during the trial was simply two pieces of thread in the State's tapestry.

The defendants were not convicted on the basis of the testimony of Brian Kellner and David Wiener. They were convicted on the basis of all the testimony and evidence adduced during the trial; the strongest and most damaging being the testimony of the defendants themselves. In the Court's view, when Mr. Kellner's testimony was presented at trial, it was barely credible. He recounted an instance which occurred after an all-day drinking bout. Mr. Kutska was intoxicated when the events occurred. Mr. Kellner was very close behind him in his level of intoxication. Mr. Kellner's ex-wife testified she was so drunk she had little recollection of anything that happened. The Court is satisfied that Kellner's testimony, as hyped as it may have been prior to its introduction, had little to do with the ultimate verdict rendered in these cases.

Mr. Kellner now recants his trial testimony. It is clear he has committed perjury either at the time of the trial or the February, 1997 motion hearings. At what time he was lying is immaterial. His trial testimony established, if believed then, that certain named individuals were present at a confrontation near a "bubbler". It does nothing more than that. It does not establish a crime, it does not establish any individual as participating in a crime, it simply places those individuals at a location consistent with testimony given by many other witnesses. To say his testimony was critical to the conviction vastly and greatly overestimates its importance and ignores five weeks of other testimony and evidence presented. The same is also true of Mr. Wiener's testimony.

Clearly, Kellner's present testimony that he cannot name individuals who were at the "bubbler" confrontation is

material. It relates to one of the pieces of circumstantial evidence upon which the State relied in obtaining a conviction. While it is material, that simply means that the testimony would be admitted during the trial; its weight would be something for the jury to consider.

Testimony concerning the reasons for recantation is indeed cumulative to the testimony introduced at the trial. The jury heard, at length, testimony regarding Sergeant Winkler's techniques, the methods used in obtaining Mr. Kellner's statement and the other pressures that may have been brought to bear from other sources. While testimony is now being recanted, the recantation is not with respect to the incident as a whole, but rather with respect to the question of identification of individuals. All other issues regarding interrogation techniques and tactics were more than adequately covered during the course of the trial and would not come as a surprise to any member of the jury.

A recantation would warrant a new trial only when corroborated by other newly-discovered evidence. The recantation in this case, together with the explanation of motives for the claimed original false testimony, affords sufficient corroboration. Therefore, the requirement of corroboration is satisfied. The affidavit of Verna Irish filed as corroboration really does nothing to add or detract with respect to Mr. Kellner's testimony.

The primary issue which the Court must address is whether it would be reasonably probable that a different result would be reached at a new trial based on the recantation by Mr. Kellner. The Court is of the opinion that Mr. Kellner's recantation would have no effect whatsoever on the result in the trial of these cases. The Court is satisfied that in spite of the publicity attendant upon Mr. Kellner's testimony, it had little, if any, effect upon the jury's verdict. Counsel for the defendant ably and effectively muted any damaging effect that Mr. Kellner may have had by pointing out the varying

degrees of intoxication among the individuals involved and establishing that, for the most part, a great deal of the playacting was of the "what if" variety. This Court has a great deal of difficulty in accepting that the recantation is in fact credible and indeed doubts that a reasonable jury would believe the recantation. However, even if such recantation were believable and a jury were to accept it as truthful, there is still no reasonable probability of a different result in the jury verdict. This previously-mentioned testimony of Kellner has been vastly overblown insofar as its weight and importance are concerned. While the State may at one time have thought such testimony to have been crucial to its case, that bubble was burst when Mr. Kellner took the stand at trial. His testimony was not crucial and his present recantation, or total impeachment, would have little effect on the result of this trial.

The defense contends David Wiener gave false testimony and is, in fact, the murderer. The grounds and allegation for the claim of false testimony by Mr. Wiener are based on affidavits and testimony presented by fellow prison inmates. This evidence likewise was not within the moving party's knowledge at the time of trial, nor has the moving party been negligent in not having discovered it prior to the presentation of these motions. This evidence too, insofar as it impeaches the testimony of Mr. Wiener, is material to the issue. Here, the defense is presented with a situation which involves impeachment of a witness. There is no recantation by Mr. Wiener, but there is testimony of witnesses who say Mr. Wiener made inconsistent statements after the conclusion of the trial. Mr. Wiener testified and denied such inconsistent statements were made. The use of "jailhouse testimony" is a morass into which this court hesitates to descend. However, the issue must be addressed.

Quite frankly, the testimony and affidavits submitted both in support of and in denial of defense's present contents might be described as imaginative, resourceful and innovative, but

in no event could the word "credible" be attached to them. While the impeachment of Mr. Wiener certainly would be material and not cumulative, the evidence presented for that impeachment would interject a sideshow atmosphere that would have a tendency to, or indeed result in the creation of a full three-ring circus. The suspect agendas which the various witnesses may have, together with the gratuitous information they tend to give in their testimony, would result in a total waste of time for the little probative value such evidence might have. Assuming, for purpoes of this decision, that all the testimony and evidence offered by the defense would be admissible to impeach Mr. Wiener, the end result would be to confuse and obfuscate the issues by digression to collateral matters.

If Mr. Wiener were impeached, that would effectively throw out his testimony that he saw the defendants Basten and Johnson hunched over carrying something which seemed to be heavy. That indeed is damaging evidence, but as previously mentioned is nothing more than one piece of evidence presented by the State upon which this case is built.

The entire case as presented by the State, insofar as it implicates the six defendants in direct involvement in the murder of the victim, was circumstantial and totally devoid of any eyewitness or direct testimony. Any of several pieces of evidence could have been removed without damage to the State's case and without assaulting the integrity of the jury's verdicts. Mr. Wiener's testimony fits in that category. To say a different result would follow by allowing the impeaching testimony to come in at a trial, is once again to ignore the reality of the balance of the trial and the other evidence presented.

ADMISSION OF KUTSKA'S OUT-OF-COURT STATEMENTS AS ERROR

This issue was previously addressed in motions prior to trial, at which time the Court allowed such statements to be admitted. As a matter of fact, once Mr. Kutska testified during the trial, those statements were then no longer hearsay within the statutory definition.

The statements made by the defendant Kutska, in the Court's view, are against his interest in that they are statements which would tend to subject him to ridicule or disgrace. One must bear in mind the background in which such statements were made. Mr. Kutska was in effect saying that he instigated a confrontation against an individual who was later found murdered. While those statements do not implicate him in the murder, they certainly portray him as an arrogant bully, enjoying the discomfort to which he subjected another person. Contrary to the assertions of inculpation or exculpation, those statements do not involve anyone in a murder. They do not implicate anyone in the crime charged.

The Court is satisfied the State could not have compelled any testimony by Mr. Kutska, as he was a named defendant with pending criminal charges. Therefore, although he may have been available as a witness for any of the defense counsel until such time as he actually claimed his Fifth Amendment privilege, he was not available to the State, and therefore, the State's position in this case is different than that of a co-defendant wishing to offer a statement against interest by another party.

. . . .

REVERSAL OF CONVICTION BECAUSE UNSUPPORTED BY EVIDENCE

As mentioned, the briefs submitted at this time focus on certain testimony deemed by defendant as prejudicial, that of Kellner and Wiener. Counsel for defendants have ably, vigorously and correctly argued that a conviction cannot be sustained on the basis of such evidence. If indeed that was the only evidence in this case, the Court would never have allowed this case to go to the jury. Overlooked is the fact that a great deal of testimony was presented during a period of five weeks including, most importantly, testimony of each of the defendants.

The evidentiary portion of the consolidated trial took a total of five weeks. During that time the State presented numerous witnesses and exhibits, a view of the crime scene was had and the jurors were allowed to take notes during the course of the testimony. From the Court's observations, the jury was observant, interested and alert. The State presented testimony and evidence setting forth time lines and locations for the defendants and various other individuals working in the paper mill. Testimony and evidence clearly established, without any question, that Mr. Monfils had been the victim of a physical assault and that his death occurred when he was thrown into the pulp vat. His death was not a suicide nor an accident. Having laid that groundwork, the State then presented evidence to show, as best it could, when the attack occurred and who was in the immediate area who could have either participated in or observed the events. At the conclusion of the State's case, there was more than adequate credible evidence which would have allowed the jury to find all defendants guilty.

Each of the defendants testified on their own behalf. The testimony of the defendants was such that the State's case was buttressed and supported with each passing day. The jury had the opportunity to listen to the witnesses and

observe their demeanor. As defense counsel argue at this time, certainly one cannot be convicted on the basis of demeanor. No one was. The observation of demeanor is simply a device by which the jury is assisted in establishing or assessing the credibility of a particular witness. Considering the testimony of the defendants together with the facts which had been established by the State, the jury could, and undoubtedly did, conclude that the defendants' testimony was not entirely truthful. Considering the evidence as a whole, there is no question that there was sufficient, competent evidence upon which the jury could return the verdict of guilty with respect to each defendant. When the defendants testified, the jury had the choice of believing or disbelieving their testimony. That is peculiarly the function of the jury and there is an adequate, logical basis for their decision in this case.

ORDER

Now therefore, for the reasons set forth above;

IT IS ORDERED:

THAT THE DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED;

THAT THE DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IS DENIED.

Dated at Appleton, Wisconsin this 24th day of February, 1997.

BY THE COURT:

/s/ _____
JAMES T. BAYORGEON
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff(s)

-vs- Case # 95 CF 00239

MICHAEL L. PIASKOWSKI,

Defendant(s)

DECISION AND ORDER

The defendant, Michael Piaskowski, has filed postconviction motions seeking to have the Judgment of Conviction vacated or, in the alternative, a new trial. Those motions were heard on May 8, 1997.

Prior to the commencement of the motion hearing, counsel for Mr. Piaskowski served a Subpoena Duces Tecum on the Green Bay Chief of Police. That subpoena required the Chief to attend the motion hearing and bring with him the following documents: (1) complaints or concerns about Randy Winkler's investigation of the Monfils murder; (2) any investigation undertaken by or on behalf of the Green Bay Police Department regarding any aspect of Randy Winkler's conduct of the Monfils murder investigation; (3) all absences from work (including, but not limited to, leaves of absence, whether voluntary or involuntary) by Randy Winkler since the conclusion of the Monfils trial; (4) disciplinary action taken or considered against Randy Winkler as a result of his conduct of the Monfils murder investigation.

. . . .

Much has been made in previous motions concerning David Weiner and the alleged favorable treatment he received from the State in exchange for his testimony. It is clear that many of the individuals who discussed Mr. Weiner are totally unacquainted with any of the facts surrounding his conviction. As an example, inmate Marcum indicates David Weiner told him that he was charged at first, but the charges were dropped for his testimony. There is no factual basis for that statement. There was never any reduction of charges against Mr. Weiner. He was found guilty of a lesser included offense and given a substantial sentence. The modification of his sentence occurred after his testimony in the Monfils trial and there is absolutely no evidence, nor any evidence from which an inference can be drawn, that there was any promise or deal made with Mr. Weiner in return for his testimony. The other grounds set forth regarding the exclusion of the nature of David Weiner's conviction, the hearsay statements of Kutska, the severance motion and the expert testimony ruling have previously been addressed by the Court.

As this Court has previously remarked, the Jury returned verdicts of guilty after a lengthy, concentrated trial. This Court is satisfied that the verdicts were based upon all the testimony and evidence heard during the course of the trial including, most importantly, the testimony of the defendants themselves. That there were contradictions and inconsistencies in some of the testimony is to be expected. The Jury was entitled to and did, in this Court's opinion, disregard evidence that they felt had no credibility. They engaged in serious deliberations, considered all the relevant evidence and arrived at their verdict. At this time, to impeach those verdicts based upon speculation and surmise by individuals who have no knowledge of the facts is totally inappropriate.

As indicated above, this court has previously heard, considered and ruled on motions filed in companion cases.

Specifically, motions have been heard and decisions filed in State of Wisconsin -vs- Reynold C. Moore, 95CF240; State of Wisconsin -vs- Dale M. Basten, 95CF242; State of Wisconsin -vs- Michael L. Johnson, 95CF243. Other than the issue raised by defense in this case concerning the personnel records, all arguments made at this time have previously been advanced and argued in the other cases. Counsel has incorporated the evidence, testimony and arguments presented in those cases into his motion in the instant case. Accordingly, this Court will incorporate by reference in this decision the decisions previously issued in the companion cases.

ORDER

Now therefore, for the reasons set forth above;

IT IS ORDERED:

THAT THE DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED;

THAT THE DEFENDANT'S MOTION TO VACATE HIS CONVICTION AND SENTENCE IS DENIED.

THAT THE PERSONNEL RECORDS FURNISHED PURSUANT TO THE SUBPOENA DUCES TECUM SHALL BE PLACED IN THE FILE UNDER SEAL TO BE OPENED ONLY FOR PURPOSES OF APPELLATE REVIEW OR BY FURTHER ORDER OF THIS COURT.

Dated at Appleton, Wisconsin this 30th day of May, 1997.

BY THE COURT:

/s/ _____
JAMES T. BAYORGEON
Circuit Court Judge

JAMES RIVER PAPER MILL
THOMAS MONFILS HOMICIDE 11-21-92

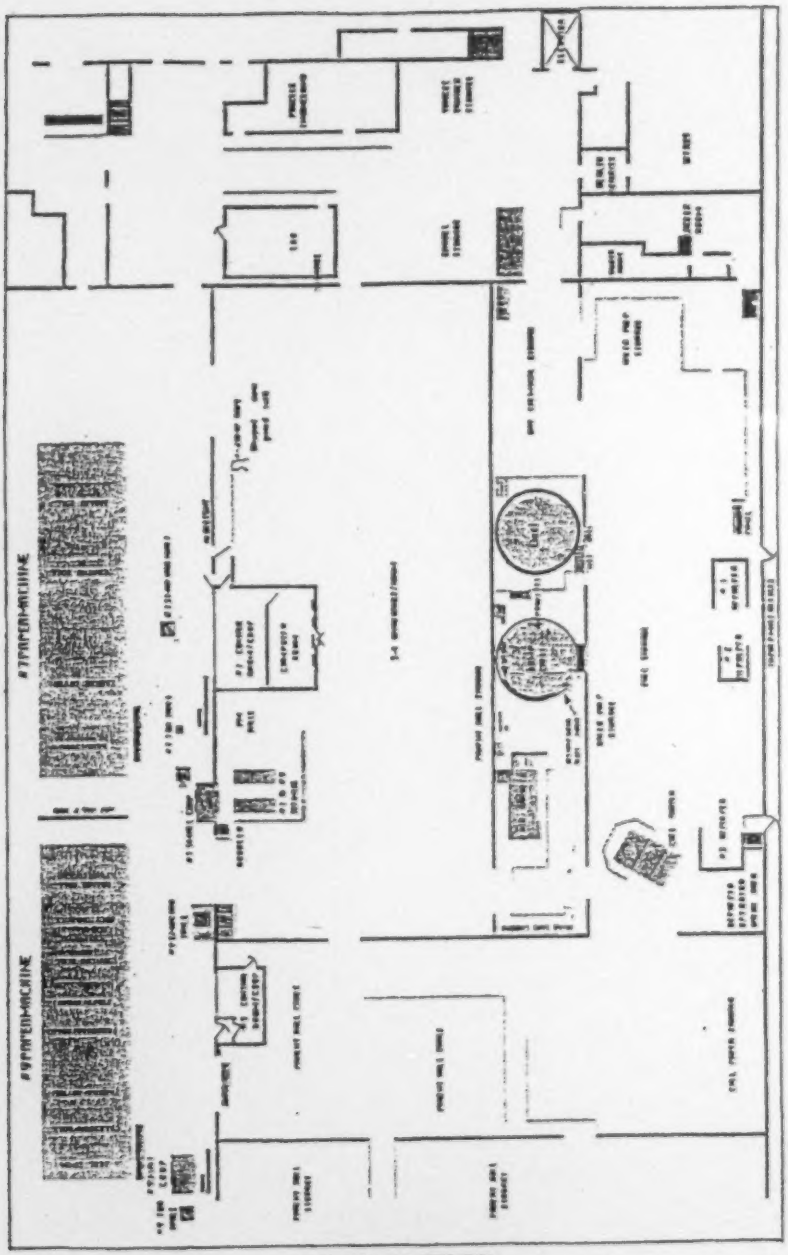

EXHIBIT
35

BEST AVAILABLE COPY